

JUL 16 1979

WILLIAM RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. **79-75**

LEON W. KNIGHT, ET AL.,
Petitioners,

v.

THE HONORABLE GERALD W. HEANEY, UNITED
STATES CIRCUIT JUDGE OF THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT, AND EARL R.
LARSON AND DONALD D. ALSOP, UNITED
STATES DISTRICT JUDGES OF THE UNITED STATES DIS-
TRICT COURT FOR THE DISTRICT OF MINNESOTA,
Respondents.

MOTION FOR LEAVE TO FILE
AND PETITION FOR WRIT OF
MANDAMUS AND/OR PROHIBITION

EDWIN VIEIRA, JR.
12408 Greenhill Drive
Silver Spring, Maryland 20904

JOHN J. FOGARTY
8316 Arlington Boulevard
Fairfax, Virginia 22038

Attorneys for Petitioners

Of Counsel:

RAYMOND J. LAJEUNESSE, JR.
8316 Arlington Boulevard
Fairfax, Virginia 22038

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PETITION FOR MANDAMUS
AND/OR PROHIBITION

Pursuant to Rule 31(1) of the Rules of this Court,
Petitioners Leon W. Knight, *et alia*, respectfully move
for leave to file their annexed Petition for Extraordi-
nary Writ.

Petitioners further move this Court to order the
Honorable Gerald W. Heaney, United States Circuit
Judge of the United States Court of Appeals for the
Eighth Circuit, and Earl R. Larson and Donald D.
Alsop, United States District Judges of the United
States District Court for the District of Minnesota, in

their capacities as Judges of the United States District Court for the District of Minnesota, to show cause why an extraordinary writ should not issue against them.

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12408 Greenhill Drive
Silver Spring, Maryland 20904

JOHN J. FOGARTY
8316 Arlington Boulevard
Fairfax, Virginia 22038

Attorneys for Petitioners

Of Counsel:

RAYMOND J. LAJEUNESSE, JR.
8316 Arlington Boulevard
Fairfax, Virginia 22038

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STATES DISTRICT JUDGES OF THE UNITED STATES DIS-
TRICT COURT FOR THE DISTRICT OF MINNESOTA,
Respondents.

PETITION FOR MANDAMUS
AND/OR PROHIBITION

Petitioners Leon W. Knight, *et alia*, respectfully petition this Court to issue an extraordinary writ in the nature of mandamus and prohibition, directed to the Honorable Gerald W. Heaney, Earl R. Larson, and Donald D. Alsop, United States Circuit and District Judges, respectively, sitting as a three-judge United States District Court in the District of Minnesota, and requiring said Judges: (i) to vacate their order of 4 April 1979, (ii) to vacate the order of 13 October 1978 issued by the Honorable Donald D. Alsop, and (iii) to order that Petitioners have the dis-

covery they requested in their Motion to Rescind the Court's order of 13 October 1978, made before the three-judge District Court and denied in its order of 4 April 1979, and such further discovery and other relief as the circumstances warrant.

OPINIONS BELOW

The District Court entered no opinions in connexion with its orders of 4 April 1979 and 13 October 1978.¹

The opinion of the United States Court of Appeals for the Eighth Circuit, granting a petition for writ of mandamus to compel the convention of a three-judge court in this case, is reported at 535 F.2d 466.

JURISDICTION

On 19 December 1974, Petitioners filed their complaint for injunctive relief in the United States District Court for the District of Minnesota, requesting a statutory three-judge court pursuant to 28 U.S.C. § 2281 (1970).² And on 30 January 1975, they filed

¹ The orders appear at Petitioners' Appendices (A.) 21-22 and 421-23 respectively. The District Court issued the earlier order orally from the Bench on 13 October 1978; the written order, however, is dated 16 October 1978.

² § 2281. *Injunction against enforcement of State statute; three-judge court required.*

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

their amended complaint with the same request. A. 5.

On 13 February 1975, Petitioners moved the convention of a three-judge court. The District Court, *per* the Honorable Donald D. Alsop, heard Petitioners' motion on 3 March 1975. On 23 December 1975, the District Court filed its memorandum-opinion and order denying the motion. A. 5-6.

Petitioners sought review of the District Court's order by petition for extraordinary writ in the United States Court of Appeals for the Eighth Circuit. On 17 May 1976, that Court commanded the District Court by writ of mandamus to convene the three-judge panel.³ On 26 May 1976, the Honorable Floyd R. Gibson, Chief Judge, United States Court of Appeals for the Eighth Circuit, designated the Honorable Gerald W. Heaney, Earl R. Larson, and Donald D. Alsop to hear the constitutional issues raised in Petitioners' amended complaint. A. 7.

On 12 August 1976, Congress repealed 28 U.S.C. § 2281, but provided that the repeal "shall not apply to any action commenced on or before [that date]".⁴

On 4 April 1979, the District Court, *per* the Honorable Gerald W. Heaney, Earl R. Larson, and Donald D. Alsop, entered the order of which Petitioners complain. A. 16-17.

Under 28 U.S.C. §§ 1253 and 2281 (1970), this Court has exclusive appellate jurisdiction over the merits of the constitutional claims for injunctive relief that Petitioners raise in their amended complaint. Therefore,

³ Knight v. Alsop, 535 F.2d 466 (8th Cir. 1976).

⁴ Pub. L. 94-381, § 7, 90 Stat. 1119, 1120.

procedurally, it has exclusive jurisdiction under the All Writs Act, 28 U.S.C. § 1651 (1970), to hear their Petition for Extraordinary Writ.⁵

Substantively, this Court has jurisdiction under 28 U.S.C. § 1651 (1970) to hear the Petition in order to protect, and to give full force and effect to, its appellate authority;⁶ because the Petition concerns the interpretation and enforcement of the Federal Rules of Civil Procedure;⁷ and because the Petition involves the right of litigants to have material evidence notwithstanding a court-order against its production.⁸

CONSTITUTIONAL PROVISION AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

This Petition involves the Fifth Amendment to the United States Constitution, and Rules 16, 26, 30, 34, and 37 of the Federal Rules of Civil Procedure, the pertinent parts of which are as follows:

United States Constitution Amendment V

* * * nor shall any person * * * be deprived of life,
liberty, or property, without due process of law * * * .

⁵ *Tidewater Oil Co. v. United States*, 409 U.S. 151, 160-61 (1972); *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486, 486-87, 496-97 (1968); *Williams v. Simons*, 355 U.S. 49 (1957); *United States Alkali Export Ass'n, Inc. v. United States*, 325 U.S. 196, 201-02 (1945); *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 216-17 (1945); *In re Stone*, 569 F.2d 156, 157 (D.C. Cir. 1978); *Blay v. Young*, 509 F.2d 650, 650-51 (6th Cir. 1974).

⁶ *E.g.*, *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943); *United States v. Beatty*, 232 U.S. 463, 467 (1914); *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803).

⁷ *Schlagenhauf v. Holder*, 379 U.S. 104, 110-11 (1964); *see Ex parte United States*, 287 U.S. 241, 245-49 (1932).

⁸ *Ex parte Uppercu*, 239 U.S. 435 (1915).

Federal Rule of Civil Procedure 16**RULE 16. PRE-TRIAL PROCEDURE; FORMULATING ISSUES.**

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
- (6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Federal Rule of Civil Procedure 26**RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY.**

(a) **DISCOVERY METHODS.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; * * * production of documents or things or permission to enter upon land or other property, for inspection and other purposes; * * * and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) **SCOPE OF DISCOVERY.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

* * * *

(c) **PROTECTIVE ORDERS.** Upon motion by a party or by the person from whom discovery is sought, and for

good cause shown, the court in which the action is pending * * * may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; * * * (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters * * * .

Federal Rule of Civil Procedure 30

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION.

(a) **WHEN DEPOSITIONS MAY BE TAKEN.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e)
* * *

* * * *

(d) **MOTION TO TERMINATE OR LIMIT EXAMINATION.** At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order

of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

* * * *

Federal Rule of Civil Procedure 34

RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) **SCOPE.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served * * * .

(b) **PROCEDURE.** The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and per-

forming the related acts. * * * The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Federal Rule of Civil Procedure 37

RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS.

(a) **MOTION FOR ORDER COMPELLING DISCOVERY.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 * * *, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. * * *

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. * * *

QUESTION PRESENTED

Does a District Court abuse its discretion and usurp power under Federal Rules of Civil Procedure 16, 26, 30, 34, and 37, and the Fifth Amendment to the United States Constitution, when it:

A. *sua sponte* and for no articulated reason, enters an order terminating discovery in a complex civil case, even though the parties from whom discovery was sought requested no, and made no showing of good cause for a, protective order; and

B. without either hearing or opinion, sustains that order in the face of an unrefuted showing by the parties seeking discovery that

1. material evidence exists in the exclusive possession of the parties from whom discovery was sought;

2. officials and staff-personnel of the latter parties have testified falsely, evasively, or incompletely under oath in depositions;

3. the latter parties and their attorneys have willfully withheld evidence that the parties seeking discovery requested, and that the Court ordered, be produced; and

4. the parties from whom discovery was sought have destroyed and may be destroying evidence?

STATEMENT OF THE CASE

Petitioners are twenty faculty-members of the Minnesota community colleges who brought this action in the United States District Court for the District of Minnesota, contending that the provisions of the Minnesota Public Employment Labor Relations Act (PELRA) requiring them as a condition of public employment to deal with the Minnesota State Board for Community Colleges solely through an organization of employees designated their "exclusive representative" are repugnant, on their face or as applied, to the United States Constitution. Petitioners' amended complaint names as defendants the Minnesota Community College Faculty Association (MCCFA), an employee-organization certified as Petitioners' exclusive representative under the PELRA; its affiliates, the National Education Association (NEA), the Minnesota Education Association (MEA), and the Independent Minnesota Political Action Committee for Education (IMPACE); various former and present officials and staff-personnel of those organizations; and officials of the State of Minnesota and the community colleges who administer the PELRA. The amended complaint alleges federal subject-matter jurisdiction under 28 U.S.C. § 1343 and 49 U.S.C. §§ 1983, 1985(3), 1986, and 1994 (1970).

Petitioners intend to prove that NEA, MEA, MCCFA, IMPACE, and their affiliates constitute a single, integrated organization that styles itself the United Teaching Profession (UTP) and operates throughout the United States.* The UTP, Petitioners contend, is substantially involved at the local, state, and national levels in the campaigns of candidates for election to public office, lobbying and other attempts to influence governmental action, propaganda and agi-

* Dr. Craig E. Schneier, Assistant Professor of Organization Behavior and Personnel Administration at the University of Maryland, testified extensively under oath, as Petitioners' expert witness, concerning the structure and character of the UTP. On the basis of his academic training, his experience as a private consultant in the area of organizational behavior and analysis, his review of the scholarly literature of organizational science, and his analysis of numerous documents from NEA, MEA, MCCFA, and IMPACE, Dr. Schneier offered his expert opinion that: (i) The UTP is a formal, complex organization consisting of various "units" or "levels", of which NEA constitutes the national level, MEA and MCCFA represent numerous affiliates at the state and local levels, respectively, and IMPACE represents numerous state-level political-action committees. (ii) The UTP has differentiated itself into local, state, and national levels in order to deal effectively with various jurisdictions of government, including local school boards, state legislatures, and the United States Congress. And (iii) although geographically differentiated, each unit of the UTP is an integral element of a single, nationwide organization; from the perspective of organizational science, NEA, MEA, MCCFA, and IMPACE are not separate and independent entities, but interdependent parts of the same entity. A. 62-63.

The UTP is not formally cited in Petitioners' amended complaint because it exists in and through the mutual affiliation-agreements and cooperative activities among NEA, MEA, MCCFA, and IMPACE *inter alia*; and these sub-entities alone are amenable to legal process. None the less, the UTP is the real defendant in this case, because Petitioners do not complain of what NEA, MEA, MCCFA, and IMPACE each do separately, but of what they all do cooperatively through the intricate network of relationships that integrates them in the UTP.

tation, litigation, and coalitions with sundry political organizations, groups, and movements. Furthermore, assert Petitioners, these political activities are essential, in the organization's own view, to achieve its goals.¹⁰

For that reason, Petitioners claim the UTP constitutes a political-action organization indistinguishable, for purposes of constitutional law, from a political party. And therefore, they say, under this Court's decision in *Elrod v. Burns*, 427 U.S. 347 (1976), the PELRA is unconstitutional in so far as it requires Petitioners, as a condition of public employment, to accept the UTP or any of its units or levels as their "spokesman", "sponsor", or "representative" for any purpose.

In their complaint, amended complaint, and motion of 13 February 1975, Petitioners requested a statutory three-judge court to determine the appropriateness of injunctive relief for their constitutional claims. On 28 February 1975, the District Court, *per* the Honorable Donald D. Alsop, heard arguments on Petitioners' motion and the motion of defendants NEA, MEA, MCCFA, and IMPACE to stay or dismiss the action. Then, on 17 March 1975, the District Court ordered all discovery suspended until resolution of defendants' motion. A. 5-6.

Seven months later, on 24 October 1975, Petitioners moved the District Court to open discovery; but the Court denied their motion. A. 6.

¹⁰ On characterizing the listed activities as "political", and defining "substantial" and "essential", see Vieira, "Are Public-Sector Unions Special Interest Political Parties?", 27 *DePaul L. Rev.* 293, 323-44, 344-49 (1978).

On 23 December 1975, the District Court, *per* the Honorable Donald D. Alsop, denied Petitioners' motion to convene a three-judge court. Petitioners immediately sought reversal of this order by extraordinary writ in the United States Court of Appeals for the Eighth Circuit. In the interim, on 31 March 1976, the District Court denied Petitioners' further motion to compel, and granted the UTP's motion to continue the suspension of, discovery. A. 6, 7.

On 17 May 1976, the Court of Appeals issued a writ of mandamus, commanding the District Court to convene a three-judge court. And on 26 May 1976, the Honorable Floyd R. Gibson, Chief Judge of the United States Court of Appeals for the Eighth Circuit, designated the Honorable Gerald W. Heaney, Earl R. Larson, and Donald D. Alsop as the three-judge panel. A. 7.

On 10 June 1976, the District Court ordered that discovery commence. A. 8. From then until discovery terminated pursuant to court-order on 31 December 1978, Petitioners worked to prove the UTP's substantial and essential involvement in political activism.

From the onset of discovery, however, the UTP interposed one obstacle after another to disclosure of its activities.¹¹ For example, Petitioners' first deponent,

¹¹ The following narration of facts rests upon record-evidence collected in the memorandum Petitioners submitted to the District Court in support of their motion to extend discovery. A. 83-323. This document and the several responsive memoranda before the District Court are appropriately included in Petitioners' Appendices because cumulatively they contain all the evidence in issue. *Compare and contrast* *Aquascutum of London, Inc. v. S.S. American Champion*, 426 F.2d 205, 213 n.6 (2d Cir. 1970).

Accompanying their memorandum-in-chief to the District Court,

Ralph Chesebrough, staff-man of MEA and Executive Director of MCCFA, testified to ignorance of how IMPACE solicits MCCFA's members for monetary

Petitioners filed nine volumes of exhibits and affidavits. These have not been reproduced in Petitioners' Appendices because: (i) The UTP did not claim below that Petitioners' memorandum-in-chief misquotes any of the deposition-transcripts, or that any of the UTP's documents to which Petitioners refer in that memorandum are not authentic or do not contain the language Petitioners quote. (ii) The UTP did not file any counter-affidavits impugning the truthfulness of Petitioners' affiants. And (iii) the UTP did not object to Petitioners' submission of any of the deposition-transcripts, documents, or affidavits. Objections not proffered below are unavailing now. *E.g.*, *Noonan v. Caledonia Mining Co.*, 121 U.S. 393, 400 (1887).

In addition, the UTP may not submit any other evidence in this Court. Petitioners' Appendices contain everything the parties called to the attention of the District Court on the motion to extend discovery, and therefore constitute the complete and sufficient record here. *See, e.g.*, *Foley Lumber Industries, Inc. v. Buckeye Cellulose Corp.*, 286 F.2d 697, 698 (5th Cir. 1961). The UTP must be satisfied with that on which it elected to rely below. *Morrissey v. Brewer*, 408 U.S. 471, 475-77 (1972); *accord*, *Economic Development Corp. v. Model Cities Agency*, 519 F.2d 740, 744 (8th Cir. 1975) (Heaney, J.); *In re Stolkin*, 471 F.2d 1331, 1340-41 (7th Cir. 1973); *United States ex rel. Bradshaw v. Alldredge*, 432 F.2d 1248, 1250 (3d Cir. 1970); *Weissinger v. United States*, 423 F.2d 795, 798 (5th Cir. 1970); *Miller v. Avirom*, 384 F.2d 319, 321-22 & nn.8-12 (D.C. Cir. 1967). Neither affidavits, nor depositions, briefs, oral arguments of counsel, or other documentary materials may now be used to interject purported evidence into this case. *Affidavits*: *Russell v. Southard*, 53 U.S. (12 How.) 138, 158-59 (1851); *Stearns v. Hertz Corp.*, 326 F.2d 405, 408 (8th Cir.) (Blackmun, J.), *cert. denied*, 377 U.S. 934 (1964); *United States v. Cannon*, 534 F.2d 139, 140 (9th Cir.), *cert. denied*, 425 U.S. 991 (1976); *Garcia v. American Marine Corp.*, 432 F.2d 6, 7-8 (5th Cir. 1970). *Depositions*: *United States v. Knight's Administrator*, 66 U.S. 488, 489-90 (1861); *Jaconski v. Avisun Corp.*, 359 F.2d 931, 936 n.11 (3d Cir. 1966); *Foley Lumber Industries, Inc.*, *supra*, 286 F.2d at 698. *Briefs*: *Morrissey*, *supra*, 408 U.S. at 475-77. *Oral arguments*: *Hassenflu v. Pyke*, 491 F.2d 1094, 1095 (5th

contributions to the campaigns of candidates for public office. Yet, other discovery later identified Chesebrough as an important cog in IMPACE's mechanism of fund-raising among community-college faculty. A. 319-22.

Joseph Letorney, staff-man of NEA, testified evasively about his activities as an "election pro" in recruiting and organizing members of NEA to work in the campaigns of candidates for public office. And, as subsequent depositions of other witnesses established, he testified falsely concerning participation by NEA's staff-personnel in the 1976 Democratic National Convention. A. 247-59 & n.108.

Gene Mammenga, Director of MEA's Governmental Relations Department, testified that he had not participated in the 1976 Carter-Mondale campaign, and knew of no one from MEA who had. Petitioners later discovered, however, that following the campaign MEA's President received a letter from President-elect Jimmy Carter "pay[ing] tribute to Gene Mam-

Cir. 1974). *Other materials*: New Haven Inclusion Cases, 399 U.S. 392, 450 n.66 (1970); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 998 n.55 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); *Wisconsin Barge Line, Inc. v. Coastal Marine Transport, Inc.*, 414 F.2d 872, 875-76 (5th Cir. 1969).

Moreover, because the UTP did not refute, and the District Court made no findings of fact and issued no opinion contradicting, Petitioners' assertions, this Court should presume that the facts Petitioners outline are true. *See, e.g.*, *Williams v. Kaiser*, 323 U.S. 471, 473-74 (1945); *House v. Mayo*, 324 U.S. 42, 45 (1945); *IBM Corp. v. Edelstein*, 526 F.2d 37, 41 (2d Cir. 1975); *Estate of Murdoch v. Pennsylvania*, 432 F.2d 867, 870 (3d Cir. 1970). Of course, since constitutional rights are implicated here, this Court may examine the evidence itself and draw its own conclusions. *E.g.*, *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971).

menga * * * who made such generous contributions of his time and energy on behalf of the Carter-Mondale ticket". A. 219-22.

Neil Sands, who held various positions in MCCFA, and Roger Johnson, member of MCCFA and Chairman of IMPACE, both testified that MEA's cadre of political activists, the "1340 Club/Committee", had never had any significant existence, or had become "defunct". Yet, as later discovery showed, both Sands and Johnson recruited MCCFA members for the "1340" organization; and, even as they were testifying, "1340" operatives were engaged in extensive political activities throughout Minnesota. A. 313-18.

Simultaneously with these and other depositions, pursuant to Federal Rule of Civil Procedure 36 Petitioners requested the UTP to admit its substantial involvement in partisan politics, lobbying, propaganda and agitation, litigation, and political coalitions. The UTP denied a majority of these requests, however, notwithstanding dispositive evidence of their truthfulness in its own publications and document-files, and in deposition-testimony of its officials and staff-personnel. A. 83-137.

By the Summer of 1978, then, Petitioners tentatively concluded that NEA, MEA, MCCFA, IMPACE, and their officials, staff-personnel, and attorneys had conspired to "stonewall" and "cover-up" the facts of the UTP's political activism. To expose the UTP's attempts illegally to suppress evidence, Petitioners employed a private detective, who infiltrated a political campaign in Minnesota in September, 1978, and discovered an NEA staff-man, R. Dick Vander Woude, operating a telephone-bank under an assumed name on

behalf of a candidate for federal office. Even more revealing, the detective then interviewed Kenneth Bresin, Assistant Director of MEA's Governmental Relations Department, who informed him that Vander Woude's active (albeit surreptitious) role, and Bresin's relative inactivity, in the campaign resulted from instructions of "NEA's attorneys" in connexion with this very case. A. 259-97.

Before Petitioners could depose either Bresin or Vander Woude, the District Court ordered a "pre-trial" conference. At the ensuing hearing on 13 October 1978, *sua sponte* and without any motion for a protective order, the Honorable Donald D. Alsop closed Petitioners' discovery effective 31 December 1978. In connexion with this order, the District Court articulated no reason for terminating discovery, found no facts, and did not determine that NEA, MEA, MCCFA, or IMPACE had shown good cause within Federal Rule of Civil Procedure 26(c) for a protective order. A. 11-12; *see* A. 437-56.

Petitioners, however, did not then oppose the order of 13 October 1978 for three reasons: First, absent deposition-testimony from Bresin, Vander Woude, and the investigator, the pattern of suppression of evidence shown by the testimony of Chesebrough, Mammenga, Sands, and Johnson, and by the UTP's denials of the requests to admit, was still fragmentary. Second, prematurely to have revealed the private detective's activities would have alerted the UTP to what he had uncovered. And third, Petitioners could not be certain that the deponents they intended to call prior to 31 December 1978—including Bresin, Vander Woude, the chief operatives of NEA's and MEA's political-action and public-relations programs, and NEA's Archivist

—would not, after all, satisfy their duties under state and federal law to tell the whole truth and produce all the documentary evidence Petitioners would demand pursuant to subpoenae *duces tecum*.

Subsequent to 13 October 1978, though, the UTP employed its tactics of “stonewalling” and “covering-up” even more ruthlessly than before. Both Bresin and Vander Woude, for example, attempted to conceal or minimize the nature and extent of their involvement in the September, 1978, election in Minnesota. A. 259-97. The testimony of Sue Zagrabelny, an MEA staff-woman who had long-standing experience with the organization’s political programs and had been a key figure in establishing the “1340” operation, was more candid—but further confirmed that Mammenga, Sands, and Johnson had not testified truthfully. A. 222, 316-17. Most replete with false and incomplete testimony, though, were the depositions of Stanley McFarland, Robert Harman, Rosalyn Baker, and Susan Lowell, NEA’s Director of Governmental Relations, Associate Director of Governmental Relations, Manager of Contacts with Federal Agencies, and Director of Communications, respectively.

Despite the UTP’s “cover-up”, Petitioners established that, at least twenty-two months before the 1976 general elections, NEA’s Governmental Relations Department prepared a master-plan for mobilizing UTP members throughout the United States as campaign-workers for a presidential candidate, and for coordinating this activity with the candidate’s campaign-staff. Yet McFarland denied that a master-plan existed, or that the UTP began planning its intervention in the 1976 presidential election prior to the Summer of that year. He admitted that NEA requested its state-

level affiliates to submit presidential-election plans in mid-1976, but professed ignorance of what the plans entailed, or what happened to them. Harman, too, claimed no recollection of these plans or their utilization, although McFarland identified him as the man in charge of dealing with them. Furthermore, the record indicates that NEA planned extensively with regard to the presidential election, on its own and with its state-level affiliates, from before 1975 to the 1976 general elections—and that both McFarland and Harman were central actors in the development and implementation of the UTP's campaign-operation. A. 137-43, 195-213, 412-13 n.2.¹²

NEA's master-plan for the 1976 presidential election foresaw selecting UTP personnel as liaisons with the candidate's campaign-staff. McFarland admitted that NEA supplied Carter-Mondale campaign-coordinators with names of the UTP's officials and staff-personnel throughout the United States who might cooperate with the campaign. But, incredibly, he claimed no knowledge of what cooperation was intended or

¹² Petitioners unearthed NEA's master-plan fortuitously. An internal NEA memorandum produced during discovery referred to one C.T. Shotts, a doctoral candidate studying the history of NEA's political-action arm, the National Education Association Political Action Committee (NEA-PAC). Through University Microfilms, Petitioners acquired a copy of Shotts' completed thesis, "The Origin and Development of the National Education Association Political Action Committee, 1969-1976". As the title states, the thesis dealt exclusively with NEA-PAC. But Appendix G, added apparently as an afterthought, reproduced the text of NEA's "Governmental Relations Program to Implement the NEA Presidential Endorsement Procedure" (dated 13 January 1975), the outline of NEA's 1976 presidential-campaign-strategy. See A. 137-43. Unfortunately, Petitioners received the Shotts thesis only *after* deposing McFarland, Baker, Harman, and Lowell.

occurred. And Harman would not even admit knowing how Carter-Mondale campaign-coordinators contacted certain of NEA's state-level affiliates identified in NEA's own publication. A. 137-43, 214-19.

NEA's master-plan for the 1976 presidential election also involved recruiting UTP members as campaign-workers for the candidate. McFarland admitted that the UTP intended to mobilize its members for the Carter-Mondale ticket; but he denied that NEA distributed kits containing directions on how its local-level affiliates could organize campaign-workers. Lowell, too, claimed not to know what the kits—admittedly produced by NEA's Communications Department—contained. She also testified that she knew nothing about what UTP members did as Carter-Mondale campaign-workers. Yet, inconsistently, she conceded that Harman had provided her with information on a considerable range of campaign-activities by members on behalf of Carter-Mondale. Harman, furthermore, denied that NEA had assigned, or even made contingency-plans to assign, any of its staff-personnel to the Carter-Mondale campaign. But NEA's master-plan contained such assignments; and Harman had discussed such a strategy with his staff in May of 1976. A. 137-43, 223-28.

The UTP's assistance to the Carter-Mondale ticket in 1976 included its "member-contact program": the mobilization of some 1,100 staff-personnel throughout the United States to establish telephone-banks for some 75,000 callers to solicit the votes of hundreds of thousands of the UTP's members on behalf of the ticket. McFarland, however, denied knowledge of that program, of any get-out-the-vote activities by NEA—or even of any campaign-activities of the very staff-

personnel his Department had assigned to establish, implement, and report on the "member-contact" program. Indeed, in the face of an NEA document referring to get-out-the-vote materials, McFarland claimed no recollection of what had happened. Baker, too, professed a lack of memory about the "member-contact" program—although, as Harman later admitted, she was primarily responsible for implementing it. A. 229-34.

Under its sophisticated budgeting system, NEA routinely evaluates its activities. None the less, Harman testified that assessments of UTP members' involvement in the 1976 Carter-Mondale campaign, and other political campaigns, were non-existent. McFarland, though, said that Harman had reported to him what transpired in various states (although McFarland claimed not to remember specifics). Lowell admitted that Harman had been her main source of information about what UTP members did for the Carter-Mondale ticket (although, again, she claimed no memory of details). And Vander Woude recalled that he had provided Harman with on-going assessments of UTP members' campaign-involvement. In addition, Harman professed no recollection of post-election surveys of the extent to which NEA's affiliates or members had participated in the 1976 campaign—or in the 1972, 1974, or 1978 campaigns, for that matter. Yet McFarland admitted that NEA had requested such information from its state-level affiliates (although he failed to remember what the assessments showed). Finally, Harman claimed no knowledge of how NEA acquired the information on its members' involvement in candidates' campaigns regularly published in its newspaper. Lowell, though, identified Harman as the primary source for these publications. A. 237-47.

Besides false and incomplete testimony, the UTP's program of "stonewalling" and "covering-up" included suppression of documentary evidence. Pursuant to Federal Rules of Civil Procedure 34 and 45, Petitioners obtained a court-order that the UTP produce the contents of the NEA Archives for inspection. But the UTP's attorneys unilaterally limited production to what they saw fit to reveal—and even admitted as much on the record in the deposition of NEA's Archivist. Moreover, besides producing only a small portion of the Archives, the UTP withheld certain other files and specifically identified documents. And its attorneys and staff-personnel also acknowledged that files and documents that post-date the filing of Petitioners' complaint have been, or are now being, destroyed. A. 145-92.

These facts convinced Petitioners that NEA, MEA, MCCFA, IMPACE, and their officials, staff-personnel, and attorneys had conspired to proffer false, evasive, and incomplete testimony; to sequester or destroy documentary evidence; and otherwise to impede Petitioners' full discovery in this case. Therefore, on 30 December 1978, Petitioners moved the District Court under Federal Rule of Civil Procedure 37 to rescind its order of 13 October 1978, and to order that the UTP make certain files, and the NEA Archives, available for direct inspection, that certain persons be deposed for a second time before a magistrate, that certain other persons be deposed, and that the UTP pay all related fees and costs. A. 25-31. Supporting this motion, Petitioners filed a documented memorandum, together with nine volumes of exhibits and affidavits. A. 35-331. In response, the UTP filed a short memorandum replete with general denials, but devoid of specific refutations, of the facts Petitioners adduced.

A. 335-66, and compare with *Petitioners' responsive memorandum*, A. 369-95.

On 2 February 1979, the District Court, *per* the Honorable Donald D. Alsop, held a hearing. However, although all counsel were prepared to argue the merits of *Petitioners'* motion, the District Court denied oral argument. And no argument was allowed prior to the entry of the Court's order of 4 April 1979, over the signatures of the Honorable Gerald W. Heaney, Earl R. Larson, and Donald D. Alsop, denying *Petitioners'* motion and commanding the parties to submit stipulations of facts, lists of exhibits and witnesses, and pre-trial briefs. A. 14, 16-17, 421-23. The District Court provided no written opinion supporting its decision. Neither did it specifically find that *Petitioners* had not established a "cover-up" on the part of the UTP. Nor did it rule that the UTP had shown good cause under Federal Rule of Civil Procedure 26(c) for an order terminating discovery.

Petitioners then moved for dissolution or stay of the order of 4 April 1979, and for reconsideration of and hearing on their earlier motion to extend discovery. A. 427-30. On 20 June 1979, the District Court, *per* the Honorable Donald D. Alsop, denied this motion. A. 471-72.

Petitioners now bring their Petition for Extraordinary Writ to review the District Court's orders of 13 October 1978 and 4 April 1979.

REASONS FOR GRANTING THE WRIT

This Court should grant the Petition for five reasons:

First, the District Court's orders of 13 October 1978 and 4 April 1979 raise questions, heretofore never ad-

dressed by any federal appellate court, concerning important aspects of discovery under Federal Rules of Civil Procedure 16, 26, 30, 34, and 37, and the Fifth Amendment to the United States Constitution. Moreover, the District Court's actions demonstrate the need for this Court to issue guidelines and standards to resolve the problems of discovery that have arisen in this case, and to minimize future error and uncertainty in the application of the Rules to other cases.¹³

Second, the District Court's orders may encourage an erroneous practice likely to recur with increasing frequency. If permitted, this practice will curtail and distort the application of Federal Rules of Civil Procedure 16, 26, 30, 34, and 37 in a manner both un- contemplated by this Court and Congress and unconstitutional—in effect, perverting and nullifying these provisions in favor of malfactors, rather than correcting wrongdoers' misuse of the Rules.¹⁴

Third, the District Court's orders are so egregiously erroneous, and so inconsistent with precedent and any tenable interpretation of Federal Rules of Civil Procedure 16, 26, 30, 34, and 37, and the Fifth Amend-

¹³ See *Schlagenhauf v. Holder*, 379 U.S. 104, 111-12 (1964); *General Motors Corp. v. Lord*, 488 F.2d 1096, 1099 (8th Cir. 1973); *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524-25 (D.C. Cir. 1975).

¹⁴ See *La Buy v. Howes Leather Co.*, 352 U.S. 249, 258 (1957); *Los Angeles Brush Manufacturing Corp. v. James*, 272 U.S. 701, 705-08 (1927); *Sanderson v. Winner*, 507 F.2d 477, 479 (10th Cir. 1974), *cert. denied sub nom. Nissan Motor Corp. v. Sanderson*, 421 U.S. 914 (1975); *Buffington v. Wood*, 351 F.2d 292, 294 & n.4 (3d Cir. 1965).

ment to the United States Constitution, that their entry constitutes an usurpation of power.¹⁵

Fourth, although beyond its powers and concerned only with matters outside the merits of the case, the District Court's orders, absent timely intervention by this Court, will remain in force and will substantially and irreparably injure Petitioners throughout the future course of proceedings below, and on appeal.¹⁶

Fifth, by preventing Petitioners from developing a complete factual record in support of their constitutional claims, the District Court's orders may subvert, or even defeat, this Court's appellate jurisdiction over those claims.¹⁷

¹⁵ See *McDonnell Douglas Corp. v. United States District Court*, 523 F.2d 1083, 1087 (9th Cir. 1975), *cert. denied sub nom. Flanagan v. McDonnell Douglas Corp.*, 425 U.S. 911 (1976); *Kerr v. United States District Court*, 511 F.2d 192, 196 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976); *In re Estelle*, 516 F.2d 480, 488 (5th Cir. 1975) (Godbold, J., concurring), *cert. denied*, 426 U.S. 925 (1976).

¹⁶ See *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 216-17 (1945); *Maryland v. Soper*, 270 U.S. 9, 29-30 (1926); *Ex parte Bradley*, 74 U.S. (7 Wall.) 364, 376 (1868); *Pfizer, Inc. v. Lord*, 456 F.2d 545, 547-48 (8th Cir. 1972); *IBM Corp. v. Edelstein*, 526 F.2d 37, 41 (2d Cir. 1975); *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 525-26 (D.C. Cir. 1975); *United States v. Hemphill*, 369 F.2d 539, 543 (4th Cir. 1966).

¹⁷ See *McClelland v. Carland*, 217 U.S. 268, 280 (1910); *United States v. United States District Court*, 334 U.S. 258, 263 (1948); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943); *United States v. Beatty*, 232 U.S. 463, 467 (1914); *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 525-26 (D.C. Cir. 1975).

I. The District Court's condonation of the United Teaching Profession's suppression of material evidence in this case is an unprecedented misapplication of Federal Rules of Civil Procedure 16, 26, 30, 34, and 37.

The District Court had no power under Federal Rules of Civil Procedure 16, 26(c), 30(d), 34, and 37(a), and under the Fifth Amendment to the United States Constitution, to terminate discovery in this case, *sua sponte* and without a showing of good cause by the UTP, after Petitioners made an unrefuted demonstration that:

1. material evidence exists in the UTP's exclusive knowledge or possession;

2. officials and staff-personnel of the UTP testified falsely, evasively, or incompletely under oath in depositions;

3. the UTP and its attorneys willfully withheld documentary evidence that Petitioners requested, and that the District Court ordered, be produced pursuant to Federal Rules of Civil Procedure 34 and 45;

4. the UTP admittedly destroyed, and may be destroying, documentary evidence that post-dates the filing of Petitioners' complaint; and

5. this wrongdoing is the product of concerted action among the UTP and its officials, staff-personnel, and attorneys, designed to impede the administration of justice by denying Petitioners access to facts necessary to prosecute their constitutional claims.¹⁸

¹⁸ Both direct evidence and the logic of the situation establish a conspiracy among the UTP and its counsel. First, the disclosures made by MEA's staff-man Bresin to Petitioners' private investiga-

Moreover, because of the extraordinary circumstances of this case, the District Court had a duty under Federal Rule of Civil Procedure 37(a) and the Fifth Amendment to order the UTP to make further discovery to purge the record of its previous misconduct, and to enable Petitioners to adduce all the facts the Federal Rules entitle them to bring forward.

Enforcement of this absence of power and duty requires construction and application of Federal Rules of Civil Procedure 16, 26(c), 30(d), 34, and 37(a), and the Fifth Amendment, in a new context. To Petitioners' knowledge, no federal appellate tribunal has yet addressed this problem. As an issue of first impres-

tor directly link "NEA's attorneys" to efforts of MEA and NEA to disguise what their staff-men Bresin and Vander Woude did in the 1978 elections. A. 264-66, 287-97.

Second, the central actors in the withholding of documents that Petitioners requested be produced, and in the bad-faith responses to Petitioners' requests to admit, were the UTP's counsel and their assistants. A. 143-91, 84-88.

Third, in the face of Petitioners' documented charges, the UTP's counsel have done nothing to explain or attempt to rehabilitate any of the deponents who testified falsely, evasively, or incompletely concerning the UTP's involvement in political activism. See A. 382-87.

And fourth, it is unreasonable to presume that Baker, Bresin, Chesebrough, Harman, Johnson, Letorney, Lowell, Mammenga, McFarland, Sands, and Vander Woude all took it upon themselves, either individually or in combination, to testify as they did. This group contains persons connected with each level of the UTP: NEA (Baker, Harman, Letorney, Lowell, McFarland, Vander Woude), MEA (Bresin, Chesebrough, Mammenga), MCCFA (Chesebrough, Johnson, Sands), and IMPACE (Bresin, Johnson, Mammenga). That these people, who occupy official or staff positions throughout the UTP, would testify as they did, without consulting counsel or in defiance of counsels' instructions, staggers the imagination.

sion, then, it is appropriate for consideration under the All Writs Act.¹⁹

What this case does not entail reveals its unprecedented character. Petitioners do not seek to adduce facts without legal significance, or proofs without effect at trial.²⁰ Rather, the District Court denied them an opportunity fully to establish the nature and extent of the UTP's political activism, particularly in the campaigns of candidates for election to public office—matters central to proof that the UTP is a political-action organization and therefore disqualified from imposing itself on Petitioners under color of law as their "spokesman" or "sponsor". A. 46-80. Neither do Petitioners demand the production of documents they already have.²¹ Rather, the District Court foreclosed access to documents Petitioners know exist in the UTP's exclusive possession, have requested it produce, and have not received because of its misconduct. A. 143-90. Nor have Petitioners failed to examine witnesses, to question them about documentary evidence, or to attack their credibility.²² Rather, the District Court disallowed further examinations even though

¹⁹ *Schlagenhauf v. Holder*, 379 U.S. 104, 110-11 (1964); *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524-25 (D.C. Cir. 1975); *United States v. United States District Court*, 444 F.2d 651, 655-56 (6th Cir. 1971), *aff'd*, 407 U.S. 297 (1972); *Miller v. United States*, 403 F.2d 77, 79 (2d Cir. 1968); *Atlass v. Miner*, 265 F.2d 312, 313-14, 319 (7th Cir. 1959), *aff'd*, 363 U.S. 641 (1960).

²⁰ *Contrast, e.g., Murphy v. Houma Well Service*, 413 F.2d 509, 511 (5th Cir. 1969).

²¹ *Contrast, e.g., Price v. Lake Sales R.M., Inc.*, 510 F.2d 388, 392 (10th Cir. 1974).

²² *Contrast, e.g., United States v. Bostic*, 336 F. Supp. 1312, 1314-15 (D.S.C.), *aff'd*, 473 F.2d 1388 (4th Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

the depositions bristle with false, evasive, and incomplete testimony; and with admissions that the UTP has withheld and destroyed material documents that post-date the filing of Petitioners' complaint. A. 190-323. Nor does the testimony of the UTP's officials and staff-personnel, and the non-production of its documents, reflect mere confusion, inadequate record-keeping, or honest mistakes on their part.²³ Rather, the District Court terminated discovery notwithstanding Petitioners' unrefuted demonstration that the UTP has concealed evidence. Nor has their own inaction, and not the UTP's misconduct, injured Petitioners.²⁴ Rather, in the face of Petitioners' exposure of its activities, the District Court rewarded the UTP, the very party that induced witnesses to testify falsely and that withheld and destroyed documents it had a duty to produce. Nor did Petitioners' request for further discovery rest on mere assertions, and not upon evidence, of the UTP's wrongdoing.²⁵ Rather, the District Court discounted over two hundred pages of evidence substantiating Petitioners' charges, without any refutation by the UTP, or any finding by the Court itself that even one of those charges is without foundation. Nor, finally, did the District Court judge the credibility of the UTP's officials and staff-personnel by first-hand observation.²⁶ Rather, the Court entered its order

²³ *Contrast, e.g., United States v. Rexach*, 41 F.R.D. 180, 185 (D. Puerto Rico 1966).

²⁴ *Contrast, e.g., Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 398, 420-23 (1923).

²⁵ *Contrast, e.g., Parker v. Checker Taxi Co.*, 238 F.2d 241, 244 (7th Cir. 1956).

²⁶ *Contrast, e.g., Assman v. Fleming*, 150 F.2d 332, 336-37 (8th Cir. 1947); *Atehison, T. & S.F. Ry. v. Barrett*, 246 F.2d 846, 849-50 (9th Cir. 1957).

of 4 April 1979 without seeing a single witness, hearing oral argument, or issuing an opinion that suggests any familiarity with what has transpired during the course of discovery in this case.

Decisions under Federal Rules of Civil Procedure 16, 26, 30, and 37 also illuminate the unprecedented misconception of its power the District Court entertained. A primary objective of Rule 16, for example, is to eliminate the "sporting theory of justice", by replacing traditional strategies of concealment, disguise, guile, sham, and legal sparring with the policy of full disclosure.²⁷ The Rule envisions an expedited trial that adjudicates honest disputes of facts on their merits, rather than on the basis of tactical advantage and surprise.²⁸ Yet such a trial presupposes complete discovery—implying that Rule 16 can be, as it has been, used to determine what discovery is necessary, and to compel disclosure of relevant information.²⁹ Here however, without any explanation the District

²⁷ *E.g.*, *Clark v. Pennsylvania R.R.*, 328 F.2d 591, 594 (2d Cir.), *cert. denied*, 377 U.S. 1006 (1964); *Bandlow v. Rothman*, 278 F.2d 867, 868-69 (D.C. Cir. 1960); *Cherney v. Holmes*, 185 F.2d 718, 721 (7th Cir. 1950); *Sunderland*, "The Theory and Practice of Pre-Trial Procedure", 36 *Mich. L. Rev.* 215, 226 (1937).

²⁸ *E.g.*, *Wallin v. Fuller*, 476 F.2d 1204, 1208 (5th Cir. 1973); *FDIC v. Glickman*, 450 F.2d 416, 419 (9th Cir. 1971); *Manbeck v. Ostrowski*, 384 F.2d 970, 975 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 966 (1968); *Walker v. West Coast Fast Freight, Inc.*, 233 F.2d 939, 941 (9th Cir. 1956); 6 *Wright & Miller, Federal Practice and Procedure: Civil* § 1522, at 567 (1970).

²⁹ *Buffington v. Wood*, 351 F.2d 292, 297-98 (3d Cir. 1965); *United States v. Maryland and Virginia Milk Producers Ass'n*, 22 F.R.D. 300, 302 (D.D.C. 1958); *Goldberg v. Ann-Vien, Inc.*, 29 F.R.D. 6, 7 (N.D. Ga. 1961); *Hertz v. Graham*, 23 F.R.D. 17, 19 (S.D.N.Y. 1958), *aff'd*, 292 F.2d 443, *cert. denied*, 368 U.S. 929 (1961).

Court denied Petitioners the very discovery they proved necessary.³⁰ The Court's order of 4 April 1979, then, does not advance the purpose of Rule 16. Quite the contrary: Instead of interring the "sporting theory of justice", the order resurrects it. Instead of penalizing concealment, the order rewards it. Instead of simplifying and sharpening the factual issues in the case, the order complicates and beclouds them. Instead of facilitating presentation of Petitioners' proofs at trial, the order frustrates it. And instead of expediting proceedings, the order delays them, and makes unlikely the resolution in a single trial and appeal of the constitutional issues Petitioners raise.³¹

Similarly, the District Court misconceived its power under Rules 26(c) and 30(d). In complex litigation particularly, a trial-court should not curtail discovery unless some limitation is essential.³² Indeed, for a protective order a party must demonstrate practical and substantial reasons, based on specific facts drawn from testimony and other appropriate sources, rather than

³⁰ The District Court did not predicate, nor could it rationally have predicated, its sweeping preclusion of discovery on the irrelevance to their theory of the case of the testimony and documents Petitioners seek. *Contrast* *New Dyckman Theatre Corp. v. Radio-Keith-Orpheum Corp.*, 20 F.R.D. 36, 37 (S.D.N.Y. 1955), with A. 46-80. Indeed, it articulated no specific reason for terminating discovery, either at the hearings of 13 October 1978 and 2 February 1979, or in its orders of 13 October 1978 and 4 April 1979.

³¹ See *infra* pp. 42, 46, 48-51.

³² *E.g.*, *General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); *Stonybrook Tenants Ass'n, Inc. v. Alpert*, 29 F.R.D. 165, 167 (D. Conn. 1961); *United States ex rel. Edelstein v. Brussell Sewing Machine Co.*, 3 F.R.D. 87, 88 (S.D.N.Y. 1943).

on unsupported contentions of counsel.³³ Here, however, apart from the UTP's grumbling before the District Court that it had already provided "enough" discovery, the record contains no showing of any cause or reason—let alone good cause—for terminating discovery in this case.³⁴ Just the opposite: Petitioners would be entitled to hold depositions even if the trans-

³³ *E.g.*, *General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); *Neonex International Ltd. v. Norris Grain Co.*, 338 F. Supp. 845, 854 (S.D.N.Y. 1972); *Apco Oil Corp. v. Certified Transportation, Inc.*, 46 F.R.D. 428, 431-32 (W.D. Mo. 1969); *Glick v. McKesson & Robbins, Inc.*, 10 F.R.D. 477, 479 (W.D. Mo. 1950); *Stankewicz v. Pillsbury Flour Mills Co.*, 26 F. Supp. 1003, 1004 (S.D.N.Y. 1939).

³⁴ At the 13 October 1978 hearing, the UTP's counsel told the District Court that

[w]e have not come to your Honor in terms of seeking protective orders and the like I think [discovery] should terminate and, very frankly, if we are going to receive additional discovery requests . . . we may have to return to the Court in order to limit that discovery. We have had a lot of discovery, it has been expensive My office has spent a lot of time in Washington, D.C., looking through records there as well as here in Minnesota. We are not interested in going any further.

I would, I guess, urge the Court to consider cutting off discovery

A. 446-47. This statement is not a proper motion for protective order under Rule 26(c) or 30(d); and, even if it were, it would be of no importance by itself in supporting such an order. *Glick v. McKesson & Robbins, Inc.*, 10 F.R.D. 477, 479 (W.D. Mo. 1950).

Moreover, whatever a trial-court's discretion to enter protective orders where *some* cause exists, it has no power to do so where *no* cause appears on the record. *See Jacobowitz v. Kremer*, 7 F.R.D. 110, 111 (S.D.N.Y. 1946): "The record clearly establishes that no good cause nor even any cause whatever for refraining from taking or for limiting the deposition has been shown. . . . [I]t would be an abuse of authority to interfere with the deposition being taken at this stage."

actions they intended to investigate had been conducted or confirmed in writing, and they had access to the documents.³⁵ How much more persuasive their position when the UTP has withheld and destroyed documents, and when its officials and staff-personnel have testified falsely, evasively, and incompletely with respect to those documents it did produce. Again, Petitioners would be entitled to conduct depositions even if the expected testimony were repetitious of information gleaned from other sources.³⁶ How much more convincing their position when the UTP has deprived them of evidence through repeated, unjustified refusals to produce documents and to answer questions candidly. And again, Petitioners would be entitled to conduct depositions even if the deponents asserted under oath that they had no knowledge of the subject-matter of the inquiry.³⁷ How compelling their position when the prior testimony of the UTP's staff-personnel establishes both their knowledge and their intent to deny or conceal that knowledge by any means.³⁸ In

³⁵ See *Morrison Export Co. v. Goldstone*, 12 F.R.D. 258, 259 (S.D.N.Y. 1952).

³⁶ See *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975).

³⁷ See *Parkhurst v. Kling*, 266 F. Supp. 780, 781 (E.D. Pa. 1967); *Transcontinental Motors, Inc. v. NSU Motorenwerke Aktiengesellschaft*, 45 F.R.D. 37, 37 (S.D.N.Y. 1968); *Overseas Exchange Corp. v. Inwood Motors, Inc.*, 20 F.R.D. 228, 229 (S.D.N.Y. 1956).

³⁸ That Petitioners requested the District Court to permit the re-deposition of several of the UTP's staff-persons charged with false or evasive testimony in their first depositions is hardly extraordinary, then; rather, the circumstances necessitate such action if Petitioners are to enjoy meaningful relief. *Contrast McNally v. Simons*, 1 F.R.D. 254, 254-55 (S.D.N.Y. 1940), *with A.* 327-28; *and see infra* note 52.

short, good cause exists for an order compelling the UTP to disclose what it has withheld, concealed, and falsified—not an order rewarding those actions with a blanket of judicially imposed secrecy at odds with everything the Federal Rules of Civil Procedure were intended to accomplish.”

In addition, the District Court misjudged its power under Rule 34. For even under that Rule as it existed prior to 1970, with its now-abandoned requirement that a party show good cause for the production of documents, Petitioners would be entitled to the relief they sought in their motion to extend discovery. A. 27-29. After all, in the face of the UTP’s withholding of numerous documents within the categories Petitioners requested be produced, and of the false, evasive, and incomplete testimony of its staff-personnel, Petitioners have established the existence of much physical evidence.⁴⁰ Petitioners have located this evidence in

³⁹ See *Banco Nacional de Credito Ejidal v. Bank of America N.T. & S.A.*, 11 F.R.D. 497, 499-500 (N.D. Cal. 1951):

One primary object of the Rules is to provide for a just, speedy, and inexpensive determination of actions. In contrast, the construction urged by respondent would result in delay, expense, and inconvenience. From the record it appears that over two years have already been consumed in attempting to get this case to trial. Obstacle after obstacle has been thrown in the path of fact-finding. It is time to call a halt to such dilatory tactics. Those who come into the courts must be prepared to be as just with their adversary as they expect the courts to be with them. Artificialities, delay, obfuscation and concealment inevitably cast a pall of disrepute over bar and court alike, and turn the trial of an action into a game of chance or a contest of wits.

⁴⁰ Compare A. 143-90 with *Houdry Process Corp. v. Commonwealth Oil Refining Co.*, 24 F.R.D. 58, 62-63, 63-64 (S.D.N.Y. 1959), and contrast with *William A. Meier Glass Co. v. Anchor Hocking Glass Corp.*, 11 F.R.D. 487, 491-92 (W.D. Pa. 1951); and *Condry v. Buckeye S.S. Co.*, 4 F.R.D. 310, 311-12 (W.D. Pa. 1945).

the UTP's exclusive possession, inaccessible to them absent court-order." Petitioners have explained how this evidence is necessary to the adequate preparation of their case, and how without it they are seriously prejudiced in protecting their constitutional rights." And Petitioners have proven that the UTP's officials and staff-personnel they deposed were reluctant to speak freely, or were openly hostile, evasive, or untruthful; that those deponents refused to reveal the contents of many documents discussed in their testimony; that the contents of documents they did describe are likely inconsistent with their descriptions; and that, in general, ascertainment of the true nature and extent of the UTP's political involvement is impossible without complete access to certain of its files."

⁴¹ Compare A. 143-90 with *National Utility Service, Inc. v. Northwestern Steel and Wire Co.*, 426 F.2d 222, 225-26 (7th Cir. 1970); and *In re Natta*, 388 F.2d 215, 219 (3d Cir. 1968), and contrast with *Harkobusic v. General American Transportation Corp.*, 31 F.R.D. 264, 265 n.2 (W.D. Pa. 1962); and *Houdry Process Corp. v. Commonwealth Oil Refining Co.*, 24 F.R.D. 58, 61-62 (S.D.N.Y. 1959).

⁴² Compare A. 46-80 with *Speedrack, Inc. v. Baybarz*, 45 F.R.D. 254, 256 (E.D. Cal. 1968); and *Roebeling v. Anderson*, 257 F.2d 615, 620-21 (D.C. Cir. 1958), and contrast with *Harkobusic v. General American Transportation Corp.*, 31 F.R.D. 264, 266-67 (W.D. Pa. 1962).

⁴³ Compare A. 192-323, 326-27 with *Southern Ry. v. Lanham*, 403 F.2d 119, 127-29 (5th Cir. 1968); *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 795 (D. Del. 1954); *Goldner v. Chicago & N.W. Ry. System*, 13 F.R.D. 326, 329 (E.D. Ill. 1952); and *Hirshhorn v. Mine Safety Appliances Co.*, 8 F.R.D. 11, 21, 24 (W.D. Pa. 1948), and contrast with *Scuderi v. Boston Insurance Co.*, 34 F.R.D. 463, 467-68 (D. Del. 1964); *Guilford Nat'l Bank of Greensboro v. Southern Ry.*, 297 F.2d 921, 926-27 (4th Cir. 1962); *McManus v. Harkness*, 11 F.R.D. 402, 403 (S.D.N.Y.

The UTP, conversely, has proven nothing—instead, confessing its wrongdoing by silence, and attempting to avoid the consequences of that malfeasance by the unavailing complaints that Petitioners have “enough” evidence already, and that to produce more would be “burdensome”.⁴⁴ Under the present Rule 34, the UTP must establish good cause for withholding documents Petitioners requested it produce.⁴⁵ Yet, although Petitioners have shown good cause for the further production of documents (albeit unnecessarily); and although the UTP has not refuted Petitioners’ proof of its bad faith in discovery (let alone established good cause for rewarding that bad faith); the District Court nevertheless applied Rule 34 more narrowly than any court even before 1970—and in a case where its broadest application is necessary.⁴⁶

1951); and *Hudalla v. Chicago, M., S.P. & P.R.R.*, 10 F.R.D. 363, 364-65 (D. Minn. 1950).

That the necessity for direct access to the UTP’s files arose primarily as a result of the non-production of documents and the depositions *following* the District Court’s order of 13 October 1978 is a factor decisively militating against its order of 4 April 1979. See *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45, 50-52 (4th Cir. 1963).

⁴⁴ *Contrast* A. 335, 336-37, 338-46, 360-61 with *Morales v. Turman*, 59 F.R.D. 157, 158 (E.D. Tex. 1972); *Cameco, Inc. v. Baker Oil Tools, Inc.*, 45 F.R.D. 384, 386 (S.D. Tex. 1968); and *United States v. American Optical Co.*, 39 F.R.D. 580, 586-87 (N.D. Cal. 1966) (Rule 45(d)).

⁴⁵ *E.g.*, *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76-77 (D. Mass. 1976); *Zucker v. Sable*, 72 F.R.D. 1, 3 (S.D.N.Y. 1975).

⁴⁶ See *Morales v. Turman*, 59 F.R.D. 157, 159 (E.D. Tex. 1972): “When important civil rights are in issue in complex litigation of widespread concern, a court must make every effort to enhance the fact-finding process available to counsel for both sides.”

Finally, the District Court misunderstood the source and nature of its power under Rule 37(a). The authority to compel discovery does not license trial-courts to grant or deny benefactions to favored litigants, as they choose.⁴⁷ Instead, under the extraordinary circumstances of this case, it implicates serious issues of due process of law, as well as the proper application of the Federal Rules.⁴⁸ Yet the District Court's order of 4 April 1979 reads, in context, as if neither Rule 37(a) nor the Fifth Amendment circumscribes its actions. Quite the contrary is true, however: Rule 37 discourages contrived "lapses of memory", evasive or incomplete answers, or other tactics witnesses use to frustrate or delay discovery.⁴⁹ How applicable that Rule here, then, where witness after witness repeatedly—and incredibly—"forgot" what he or she and the UTP did in the area of partisan politics. Again, Rule 37 disallows parties to treat discovery-proceedings as a contest in devising ruses to conceal the truth.⁵⁰ How appropriate that Rule here, then, where the UTP used one subterfuge after another to forestall discovery.

⁴⁷ No judicial power is "an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility". *Ex parte Secombe*, 60 U.S. (19 How.) 9, 13 (1856); *Ex parte Bradley*, 74 U.S. (7 Wall.) 364, 377 (1868).

⁴⁸ See *infra* p. 45.

⁴⁹ *E.g.*, *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13, 18-19 (E.D. Pa. 1970) ("[d]iscovery procedures cannot be frustrated by such transparent sham" as "don't recall" answers), *aff'd*, 438 F.2d 1187 (3d Cir. 1971); *Cromaglass Corp. v. Ferm*, 344 F. Supp. 924, 927-28 (M.D. Pa. 1972); *Braziller v. Lind*, 32 F.R.D. 367, 367-68 (S.D.N.Y. 1963).

⁵⁰ *E.g.*, *Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602, 614-15 (2d Cir. 1964).

And again, Rule 37 particularly disdains participation of counsel in schemes to suppress evidence.⁵¹ How necessary that Rule here, then, where Petitioners exposed the complicity of "NEA's attorneys" in a "cover-up". In short, Rule 37 compels the relief Petitioners requested and the District Court denied, including re-deposition of those witnesses who testified falsely, evasively, and incompletely;⁵² the appointment of a master to preside at future depositions;⁵³ and unimpeded access to the UTP's files.⁵⁴

⁵¹ *E.g.*, Shapiro v. Freeman, 38 F.R.D. 308, 313 (S.D.N.Y. 1965), quoted with approval in Palma v. Lake Waukomis Development Co., 48 F.R.D. 366, 369 (W.D. Mo. 1970):

[The attorney] had no right whatever to impose silence or to instruct the witnesses not to answer

. . . . [T]hroughout the entire discovery process plaintiffs' lawyers have been acting in utmost bad faith. . . . [T]hey willfully torpedoed defendants' attempt to take a deposition ordered by this court.

The Federal Rules of Civil Procedure were designed as an affirmative aid to substantive justice, and those who choose to read them restrictively do so at their peril. It is time that depositions be conducted by members of the bar in a cooperative manner, in accordance with both the letter and spirit of the rules It is clear to us that plaintiffs' attorney has no conception of his obligation to observe the rules "as an officer of the court" or otherwise. Rather, he appears to be bent on concealing vital facts or, at best, waging a war of delay, expense, harassment and frustration. There is no justification for his conduct, no basis at all for his instructing the deponents not to answer.

⁵² See *Macrina v. Smith*, 18 F.R.D. 254, 258 (E.D. Pa. 1955), and compare with A. 29, 327-28.

⁵³ See *Shapiro v. Freeman*, 38 F.R.D. 308, 313 (S.D.N.Y. 1965), and compare with A. 29, 327-28.

⁵⁴ See A. 28-29, 326-27, and contrast with *Budget Rent-A-Car of Missouri, Inc. v. Hertz Corp.*, 55 F.R.D. 354, 356-57 (W.D. Mo. 1972), which indicates that Petitioners have willingly assumed a discovery-burden the UTP could not have imposed upon them.

The interpretation of Federal Rules of Civil Procedure 16, 26, 30, 34, and 37 implicit in the District Court's order of 4 April 1979 so offends the intentment of those Rules that this Court should intervene now—not only to do justice to Petitioners while there is still time,⁵⁵ but also to forefend error and uncertainty in the application of the Rules to other cases.

- II. Besides rewarding the United Teaching Profession's contempt for Federal Rules of Civil Procedure 26, 30, and 34 in this case, the District Court's sanction of its "stonewalling" and "covering-up" will encourage other unscrupulous parties to flout those Rules at every opportunity.**

The District Court's misapplication of Federal Rules of Civil Procedure 16, 26, 30, 34 and 37 comes at an inopportune and dangerous moment. Mr. Justice Powell recently expressed understandable concern over "the widespread abuse of discovery that has become a prime cause of delay and expense in civil litigation", and noted that "discovery techniques and tactics have become a highly developed litigation art—one not infrequently exploited to the disadvantage of justice".⁵⁶ The evidence on which this statement rests supports strict enforcement of the limitations in the federal discovery-rules where a party attempts to extend discovery oppressively.⁵⁷ But, by a parity of reasoning, it counsels an equally rigorous enforcement of those rules where a party attempts to frustrate discovery illegally. The abstraction that "extensive discovery is an abuse", however, although true in particular in-

⁵⁵ See *infra* pp. 48-51.

⁵⁶ *Herbert v. Lando*, — U.S. —, —, 47 U.S.L.W. 4401, 4407 (17 Apr. 1979) (concurring opinion).

⁵⁷ See *id.* at —, 47 U.S.L.W. at 4407 (opinion of the Court).

stances, may become a rationalization against discovery in general—to the detriment of litigants, such as Petitioners, for whom comprehensive discovery is essential to protect their constitutional rights. Litigants such as NEA, MEA, MCCFA, and IMPACE—for whom comprehensive discovery means defeat—may fashion a new litigation art—based on “stonewalling” and “covering-up”, and designed to dupe busy trial-courts into curtailing discovery without good cause and to the disadvantage of justice.

The District Court’s order of 4 April 1979 provides precedent for the most perverse developments of that kind. First, it rewards the UTP for employing techniques of concealment and suppression of evidence that have long been condemned as widespread abuses, that have caused and will cause extensive delay and expense in this case, and that have prejudiced Petitioners’ fundamental liberties.⁵⁸ Second, the order shows

⁵⁸ On the types of discovery-abuses encountered in complex litigation, *see, e.g.*, Freeman, “The Attorney-Corporate Client Privilege: An Obstacle to the Pursuit of Truth”, *Litigation*, Vol. 2, No. 3, at 1-2 (Spring 1976):

Obtaining facts through corporate witnesses is always a difficult task, especially when a significant amount of time has elapsed between an event in question and the examination of those witnesses at depositions or at trial. Established programs within corporations for the periodic destruction of records eliminate one important source of evidence. Without the possibility of being impeached by written correspondence, memoranda or other documents, witnesses can safely retreat behind a lack of recollection.

• • • [A]ccess to earlier recorded recollection is crucial to effective discovery. For practical reasons, discovery • • • may not occur until three to five years after the conspiracy has been unmasked, and even more years after the crucial events and conversations that were the inception of the illegal scheme. The failing memories of conspirators—real or feigned—prevent meaningful inquiry into secret agreements and conduct that were the basis of the conspiracy.

The barriers to getting hard evidence • • • are formidable;

that at least one trial-court is willing to terminate discovery *sua sponte* if the parties from whom discovery is sought can give enough untruthful testimony, withhold enough documents, consume enough time—and brazenly enough defend their wrongdoing with the notion that the Federal Rules entitle the parties seeking discovery only to false and evasive testimony and incomplete production of documents.⁸⁹ And third, in conjunction with this Petition, the order indicates how procedurally difficult and costly is the aggrieved parties' only efficacious means to relief.

The District Court's order of 4 April 1979 is self-defeating, because it leaves the *first* trial (yet to be had) necessarily abortive in nature, and sets the stage for appeal to this Court, reversal and remand for further discovery, and a *second* trial. This result alone is perhaps sufficient to warrant an extraordinary writ here.⁹⁰ How necessary such a writ, then, when the District Court's order also provides precedent for other trial-courts in other cases practically to nullify the discovery-rules at the behest of the very parties against whom those rules demand unrelenting enforcement.⁹¹

discovery may be frustrated by well-rehearsed, false and evasive testimony. . . . In these circumstances, the only available record of the facts is contained in statements taken from employees If these remain locked in the . . . files, the truth may never be ascertained.

⁸⁹ Such is the sole defense the UTP proffered to the District Court. See A. 360-61, 404.

⁹⁰ See *Padovani v. Bruchhausen*, 293 F.2d 546, 547-48 (2nd Cir. (1961)). See *infra* pp. 46, 48-51.

⁹¹ See *Los Angeles Brush Manufacturing Corp. v. James*, 272 U.S. 701, 706-08 (1927); *Sanderson v. Winner*, 507 F.2d 477, 479 (10th Cir. 1974), *cert. denied sub nom. Nissan Motor Corp. v. Sanderson*, 421 U.S. 914 (1975).

Indeed, should this Court deny Petitioners relief, what teaching will the inferior federal courts and the trial-bar perceive other than that the Federal Rules of Civil Procedure apply only to those parties too timorous to scout them? How compelling an extraordinary writ in this case, therefore, if only to admonish lower courts and the bar that concealment, guile, sham, and obstruction find no encouragement or aid in either the Rules of their enforcement by this Court.

III. The District Court had no power to terminate Petitioners' discovery once they exposed a scheme on the part of the United Teaching Profession to give false and incomplete testimony and illegally to withhold physical evidence.

That American courts lack authority to encourage, condone, or reward litigants' suppression of evidence should be self-evident; yet here, the District Court proceeded as if the opposite were true. Its order of 4 April 1979 thus falls within that category of "extremely bad judicial decision[s]" that are "so egregiously erroneous" as to constitute an usurpation of power.⁶²

As detailed in Part I.,⁶³ the District Court's order is inconsistent with any tenable interpretation of Federal Rules of Civil Procedure 16, 26, 30, 34, and 37, and therefore appropriately correctable by extraordinary writ.⁶⁴ The basic purpose of the Rules, after all, is to administer justice through fair trials—which compels

⁶² *In re Estelle*, 516 F.2d 480, 488 (5th Cir. 1975) (Godbold, J., concurring), *cert. denied*, 426 U.S. 925 (1976).

⁶³ *Supra* pp. 27-40.

⁶⁴ *See McDonnell Douglas Corp. v. United States District Court*, 523 F.2d 1083, 1087 (9th Cir. 1975), *cert. denied sub nom. Flanagan v. McDonnell Douglas Corp.*, 425 U.S. 911 (1976).

the conclusion that judicially imposed impediments to the development, presentation, and determination of facts should be avoided wherever possible, not maximized as the District Court has done here." To be sure, in ordinary cases, trial-courts should police their dockets to expedite litigation. This case, however, involves complex facts concerning the political activities and intentions of a huge, nationwide organization over the last eight years, together with the UTP's startling efforts to frustrate Petitioners' discovery of those facts. The District Court should have considered these unique circumstances, particularly in so far as they became known only after its order of 13 October 1978." Instead, it ignored them, in deference to its own undisclosed purposes."

⁶⁵ *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373-74 (1966); *IBM Corp. v. Edelstein*, 526 F.2d 37, 40-41 (2d Cir. 1975).

⁶⁶ *See Freehill v. Lewis*, 355 F.2d 46, 48-49 (4th Cir. 1966).

⁶⁷ At the hearing of 2 February 1979, the Honorable Donald D. Alsop told the parties that:

[t]here is no way to describe the reaction, I guess, to what has transpired since [the hearing and order of 13 October 1978] in the sense that obviously the case has taken an entirely different turn based upon everything I have tried to accomplish over the last three years * * *.

I do not propose to hear these motions. They are going to be heard by a three-judge panel.

A. 460. The District Court held no hearing on Petitioners' motion at all, however. Neither did it ever explain how what it had "tried to accomplish over the last three years" justified denial of Petitioners' request for relief from the UTP's "cover-up".

Perhaps the Court was referring to a desire to move the case to trial. Yet, since the UTP's conduct has made extension of discovery imperative if Petitioners are to secure a full factual record, the Court's inclination to proceed with dispatch hardly rationalizes sanctions against the aggrieved parties and rewards for the mal-factors. *See Fowler v. Wirtz*, 34 F.R.D. 20, 23-24 (S.D. Fla. 1963).

Whatever these purposes may be, they cannot support the District Court's termination of discovery, because of the repugnance of its order of 4 April 1979 to the Due Process Clause of the Fifth Amendment.⁶⁸ In criminal prosecutions, for example, the government may not itself solicit or use perjured testimony,⁶⁹ deliberately misrepresent the truth,⁷⁰ rely on incomplete or misleading facts,⁷¹ allow false evidence to go uncorrected when it appears,⁷² or suppress material evidence, favorable to his case, that a defendant has requested be produced.⁷³ The principles of due process would be self-contradictory if they denied government the power to do these things directly, yet licensed it, through judicial "discretion", to blink the same wrongdoing by civil litigants under the Federal Rules of Civil Procedure—particularly where those Rules provide the sole means by which Petitioners can assert their federal constitutional and statutory rights in the national courts.⁷⁴ Yet only such an incoherent gloss to the Due Process Clause can sustain the District Court's order of 4 April 1979.

⁶⁸ See *Western Electric Co., Inc. v. Stern*, 544 F.2d 1196, 1198-99 (3d Cir. 1976).

⁶⁹ *E.g.*, *Alcorta v. Texas*, 355 U.S. 28, 30-32 (1957); *White v. Ragan*, 324 U.S. 760, 763-64 (1945); *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935).

⁷⁰ *Miller v. Pate*, 386 U.S. 1 (1967).

⁷¹ *Moore v. Illinois*, 408 U.S. 786, 807-10 (1972) (Marshall, Douglas, Stewart, and Powell, JJ., dissenting in part).

⁷² *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

⁷³ *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972); *Brady v. Maryland*, 373 U.S. 83, 86-88 (1963).

⁷⁴ Compare *Lee v. Habib*, 424 F.2d 891, 901-02 (D.C. Cir. 1972), with *Bodie v. Connecticut*, 401 U.S. 371 (1971).

Even more revealing of the egregiously erroneous nature of that order is its paradoxical result in penalizing Petitioners for having suffered and exposed, and rewarding the UTP for having conceived and perpetrated, a fraud upon Petitioners and the judicial system. The UTP's illegal actions will prevent Petitioners, despite their own diligence, from fully presenting their case. Those actions, therefore, would compel a second trial in this action, let alone complete discovery to guarantee the fairness of the first trial.⁷⁵ Indeed, Petitioners would be entitled to a new trial even if the UTP had not deliberately and maliciously concealed the truth,⁷⁶ or even if the false and evasive testimony of its officials and staff-personnel had arguably little weight on the trial-court's judgment.⁷⁷ How compelling their right to relief, then, where the uncontroverted evidence exposes a deliberately planned and carefully executed scheme to defeat the administration of justice.⁷⁸ Conversely, how repellant the aid and comfort

⁷⁵ See, e.g., *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 398, 420-21 (1923); *United States v. Throckmorton*, 98 U.S. 61, 65-66 (1878); *Fiske v. Buder*, 125 F.2d 841, 849 (8th Cir. 1942).

⁷⁶ See *Bros Inc. v. W.E. Grace Manufacturing Co.*, 351 F.2d 208, 210-11 (5th Cir. 1965), *cert. denied*, 383 U.S. 939 (1966).

⁷⁷ See *Peacock Records, Inc. v. Checker Records, Inc.*, 365 F.2d 145, 147 (7th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); *Atchison, T. & S.F. Ry. v. Barrett*, 246 F.2d 846, 849 (9th Cir. 1957).

⁷⁸ See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-47 (1944). The involvement of "NEA's attorneys" in this scheme raises particularly serious issues. Compare and contrast *Petry v. General Motors Corp., Chevrolet Division*, 62 F.R.D. 357, 358-61 (E.D. Pa. 1974).

Hazel-Atlas Glass Co. explodes the UTP's recurrent argument that Petitioners sought relief "too late". E.g., A. 335, 346-47, 348-51, 356, 361-62. As this Court said in that case,

[w]e cannot easily understand how, under the admitted facts,

the District Court has given the UTP's "cover-up", when Petitioners' unrefuted demonstration supports the harshest of sanctions under Rule 37, not tacit approbation.⁷⁹

In short, no source of judicial power under the Federal Rules of Civil Procedure or the United States Constitution subtends the District Court's order of 4 April 1979. Undoubtedly, the UTP is unwilling to make full discovery in this case; but neither that reluctance, nor a judicial *fiat* such as the latter order, can deprive Petitioners of their right, founded on the necessities of litigation and the requirements of justice, to the evidence necessary to vindicate their constitutional freedoms in court.⁸⁰

Hazel should have been expected to do more than it did to uncover the fraud. But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. • • • [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

322 U.S. at 246. *Accord*, *Estate of Murdoch v. Pennsylvania*, 432 F.2d 867, 870 (3d Cir. 1970).

⁷⁹ See, e.g., *United States v. Moss-American, Inc.*, 78 F.R.D. 214, 215-17 (E.D. Wis. 1978).

⁸⁰ See *Ex parte Uppereu*, 239 U.S. 435, 439-40 (1915); *Olympic Refining Co. v. Carter*, 332 F.2d 260, 264-66 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964).

IV. Absent immediate intervention by this Court, the District Court's order of 4 April 1979 will irreparably prejudice the vindication of Petitioner's constitutional freedoms.

Irreparable injury to Petitioners is an unavoidable consequence of the District Court's usurpation of power in prematurely terminating discovery of the UTP's political activities. The District Court's order of 4 April 1979 forecloses relief through pre-trial investigations under the discovery-rules.⁸¹ In addition, a trial under the present circumstances will likely prove useless.⁸²

⁸¹ Contrast *Kerr v. United States District Court*, 426 U.S. 394, 404-06 (1976); *Southern California Theatre Owners Ass'n v. United States District Court*, 430 F.2d 955, 956 (9th Cir. 1970).

The District Court denied Petitioners' motion to reconsider that order. A. 471-72. Thus the Court has provided the UTP with an opportunity to purge its files of incriminating documentation, to coach potential witnesses, and to prepare new subterfuges to defeat exposure of its political involvement.

⁸² Although not dispositive, the uselessness of a trial is a consideration to be weighed in the exercise of supervisory power under the All Writs Act. See *Ex parte Skinner & Eddy Corp.*, 265 U.S. 86, 95-96 (1924).

Such a consideration is peculiarly apt here, in light of the District Court's manifest hostility to a trial, as expressed at the hearing of 2 February 1979:

THE COURT [per the Honorable Donald D. Alsop]: Help me as to how you feel I get the facts before the three-judge panel?

MR. MILLER [counsel for the UTP]: Judge, if we can't do it—

THE COURT: You say you can't. Tell me how you propose to do it?

MR. MILLER: If we cannot do it by way of stipulation of facts I would propose that we are either going to have some

At trial, Petitioners will be unable to compel attendance of those witnesses who work in the UTP's national headquarters in Washington, D.C., and who testified falsely or evasively in depositions.⁸³ Arguably, Petitioners might be able to require the UTP to produce various documents pursuant to a subpoena *duces tecum*; but the attitude regarding document-production under Rule 34 embodied in the District Court's order of 4 April 1979 renders this possibility slim.⁸⁴

supplemental live testimony . . . , that failing a stipulation of facts what can we do besides having a full-blown trial.

THE COURT: I can tell you you are not going to have a full-blown trial, I can tell you that.

MR. MILLER: That is my understanding.

THE COURT: All of you dispossess yourselves of the idea that there is going to be testimony in this case because based on my informal conversations with the other judges, I can tell you that is not going to happen.

A. 464-65. An extraordinary writ, of course, is the remedy of choice where a jury-trial, such as Petitioners demanded in their amended complaint, is illegally denied. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501-11 (1959); *Ex parte Peterson*, 253 U.S. 300, 305-06 (1920); *Ex parte Simons*, 247 U.S. 231, 239-40 (1918); *In re Zweibon*, 565 F.2d 742, 745-46 (D.C. Cir. 1977); *Lee Pharmaceuticals v. Mishler*, 526 F.2d 115, 116-17 (2d Cir. 1975); *Tights, Inc. v. Stanley*, 441 F.2d 336 (4th Cir. 1971), *cert. denied*, 404 U.S. 852 (1971); *Bruce v. Bohanon*, 436 F.2d 733, 735-36 (10th Cir.), *cert. denied*, 403 U.S. 918 (1971); *see Thompson v. Board of Educ.*, 476 F.2d 676, 677-78 (5th Cir. 1973) ("[w]hen this case was set for trial . . . the parties were informed that there would be no trial in the sense of hearing witnesses or taking evidence").

⁸³ See Federal Rule of Civil Procedure 45(e).

⁸⁴ Cf. 4A *Moore's Federal Practice* ¶ 34.06, at 34-44 & nn.18-19 (1978). That Petitioners could subpoena documents at trial, however, does not militate against the relief they seek here. *See Greyhound Lines, Inc. v. Miller*, 402 F.2d 134, 140-45 (8th Cir. 1968).

In any event, Petitioners need, not documents alone, but documents explained by the candid testimony of those officials and staff-personnel of the UTP knowledgeable about the activities the documents record. Yet, without particular documents to force them into admissions, such witnesses from the UTP as Petitioners can summon to trial will have no more incentive to testify candidly than did previous deponents." And without the clarifying testimony of particular individuals, such documents as Plaintiffs can obtain hereafter will be less probative than they could be.

Furthermore, the success of their constitutional claims depends on the quantity, as well as the quality, of evidence Petitioners adduce. If Petitioners prove that political involvement is essential to the achievement of the UTP's goals, they will establish its disqualification, under the First and Fourteenth Amendments, to impose itself as their "spokesman" or "sponsor" under color of Minnesota law." The conclusion that the UTP is a political-action organization, though, rests upon the totality of the circumstances surrounding its activities and intentions." And the very concept of "totality" implies that the sheer mass of proofs available is important.

If the UTP's "cover-up" prevents a jury from finding that it is a political-action organization, the District Court must enter judgment against Petitioners. On appeal, this Court will inevitably reverse and remand—not, however, for another trial that could ac-

⁸⁵ A. 195-97 & n.89, 249-51 & n.106.

⁸⁶ See *Elrod v. Burns*, 427 U.S. 347, 355 (1976) (opinion of Brennan, J.).

⁸⁷ *Vieira*, *supra* note 10, 27 *DePaul L. Rev.* at 344-49.

comply with nothing, but for further discovery to purge the case of the UTP's pre-trial wrong-doing. Whether that discovery succeeds, though, will depend upon the fortuitous availability of witnesses and the extent of their detailed recall of events that transpired years before, and upon the existence of documents that Petitioners know the UTP is now destroying.⁸⁸ If its already exposed scheme of suppressing evidence portends future events, by the time discovery begins again on remand after appeal to this Court, the UTP will have perfected its "cover-up" and forever precluded Petitioners from collecting the evidence to which they are entitled.

This result alone justifies the issuance of an extraordinary writ now, before it is too late.⁸⁹

V. By denying Petitioners the opportunity to develop a complete factual record in support of their constitutional claims, the District Court's order of 4 April 1979 will defeat this Court's appellate jurisdiction over those claims.

The Court of Appeals for the Eighth Circuit held that Petitioners' amended complaint raises substantial constitutional questions.⁹⁰ And this Court has repeatedly premonished litigants that constitutional issues are almost never ripe for decision absent a detailed

⁸⁸ A. 190-92.

⁸⁹ See *Pfizer v. Lord*, 456 F.2d 545, 547-48 (8th Cir. 1972); *United States v. Hemphill*, 369 F.2d 539, 543 (4th Cir. 1966); *Atlass v. Miner*, 265 F.2d 312, 313 (7th Cir. 1959), *aff'd*, 363 U.S. 641 (1960); *cf.* *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 216-17 (1945).

⁹⁰ *Knight v. Alsop*, 535 F.2d 466, 469-70 (8th Cir. 1976).

factual record.⁹¹ These decisions mandate complete discovery in this case. Furthermore, what constitutes *complete* discovery under the peculiar circumstances here is a matter for Petitioners, not the trial-court, to decide.⁹² The District Court, however, has exceeded its authority under the Federal Rules of Civil Procedure, and ordered that Petitioners have less-than-complete discovery notwithstanding their unrefuted demonstration of the UTP's suppression of evidence.

The potential effect of the District Court's order of 4 April 1979 is two-fold: First, if it precludes a jury from finding that the UTP is a political-action organization, the order will foreclose immediate appellate review by this Court of the fundamental constitutional issue of whether, consistently with the First Amendment, such an organization can impose itself as the "spokesman" or "sponsor" of dissenting faculty-members in a public institution of higher education. Second, even after this Court reverses a trial-court judgment against Petitioners, and remands for further discovery and factual findings, the order may still defeat appellate review of the merits by affording the UTP sufficient time to perfect its "cover-up" through destruction of documents and coaching of witnesses.

The potential frustration of this Court's exclusive appellate jurisdiction by the District Court's order of 4 April 1979, then, presents a classic situation for in-

⁹¹ *E.g.*, *Wheeler v. Barrera*, 417 U.S. 402, 426-27 (1974); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 586-87 (1972); *Cogwill v. California*, 396 U.S. 371, 372 (1970) (Brennan and Harlan, JJ., concurring); *Shaffer v. Heitner*, 433 U.S. 186, 220-22 (1977) (Brennan, J., concurring and dissenting).

⁹² *See Dennis v. United States*, 384 U.S. 855, 873-75 (1966).

tervention by extraordinary writ.⁹³ Petitioners, after all, are not requesting this Court to review the constitutional merits of their case now—but instead to remove obstructions the District Court has imposed so that they can develop the factual record necessary for this Court to address the merits hereafter.⁹⁴

In sum, material evidence exists within the exclusive control and knowledge of the UTP, its officials, staff-personnel, and attorneys. Throughout the course of this litigation, the UTP has illegally withheld or falsified evidence. And although Petitioners have exposed the UTP's wrongdoing, without refutation on its part, the District Court has sanctioned that malfeasance anyway through its order of 4 April 1979. That order, however, is inconsistent with any tenable interpretation of Federal Rules of Civil Procedure 16, 26, 30, 34, and 37, or of the Fifth Amendment to the United States Constitution, and exceeds any trial-court's authority to limit discovery. Furthermore, if

⁹³ See *United States v. United States District Court*, 334 U.S. 258, 263 (1948); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943); *United States v. Beatty*, 232 U.S. 463, 467 (1914); *McClelland v. Carland*, 217 U.S. 268, 280 (1910); *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 525-26 (D.C. Cir. 1975). As the Circuit Court said in *Colonial Times, Inc.*,

resolution of this issue of discovery may be significant to the particular case under review. The availability of depositions . . . may determine the state of the record presented to the District Court for decision and to this Court for review. If the record is inadequate, as it seemingly would be, then the [discovery] issue could well be controlling in the litigation. . . . [D]iscovery issues of the sort raised by this case . . . are often collateral to the litigation and thus lost to appellate review in fact if not in theory.

⁹⁴ Compare and contrast *Pacific Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S. 1310, —, 98 S. Ct. 2, 4 (1977) (Rehnquist, Circuit Justice).

not vacated, the order will irreparably injure Petitioners by denying them evidence necessary to the vindication of their First-Amendment liberties; will defeat this Court's exclusive appellate jurisdiction over a constitutional issue of substantial consequence and public interest; and will encourage wholesale disregard of the discovery-rules by every civil litigant with something to hide and the temerity to hide it. Under these circumstances, therefore, an extraordinary writ from this Court is necessary.

PRAYER FOR RELIEF

On the basis of the foregoing, Petitioners pray that this Court issue an extraordinary writ in the nature of mandamus and prohibition, commanding the Honorable Gerald W. Heaney, Earl R. Larson, and Donald D. Alsop, United States Circuit and District Judges, respectively, sitting as a three-judge United States District Court in the District of Minnesota,

A. To vacate their order of 4 April 1979;

B. To vacate the order of 13 October 1978 issued by the Honorable Donald D. Alsop; and

C. To order that Petitioners have the discovery they requested in their Motion to Rescind the Court's Order of 13 October 1978, made before the three-judge District Court and denied in its order of 4 April 1979, together with such further discovery and other relief as may be warranted under the circumstances then prevailing.

Respectfully submitted,

EDWIN VIEIRA, JR.
12408 Greenhill Drive
Silver Spring, Maryland 20904

JOHN J. FOGARTY
8316 Arlington Boulevard
Fairfax, Virginia 22038

Attorneys for Petitioners

Of Counsel:

RAYMOND J. LAJEUNESSE, JR.
8316 Arlington Boulevard
Fairfax, Virginia 22038

16 July 1979

VERIFICATION OF COUNSEL

Edwin Vieira, Jr., being first duly sworn, deposes that he is counsel for Petitioners herein; that he has read the foregoing Petition for Extraordinary Writ; and that, to the best of his information and belief, the facts therein stated are true.

EDWIN VIEIRA, JR.

Sworn and subscribed to before me this sixteenth day of July, 1979.

NOTARY PUBLIC

My Commission expires _____

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rules 31(1), 33 (1), and 36(1) of the Rules of this Court, I have served three copies of Petitioners' Motion for Leave to File Petition for Extraordinary Writ, Petition for Extraordinary Writ, and Appendices on each of the following Respondents or Counsel for Respondents, by mailing said copies to the addresses listed below, first-class postage-prepaid priority mail.

The Honorable Gerald W. Heaney
 The Honorable Earl R. Larson
 The Honorable Donald D. Alsop
 c/o Mr. Gerald Berquist,
 Chief Deputy Clerk
 United States District Court
 514 United States Court House
 Minneapolis, Minnesota 55401

Barbara Lindsey Sims, Esq.
 Special Assistant Attorney General
 515 Transportation Building
 St. Paul, Minnesota 55155

Donald J. Muetting, Esq.
 Special Assistant Attorney General
 303 Capitol Building
 550 Cedar Avenue
 St. Paul, Minnesota 55155

Eric Miller, Esq.
 Oppenheimer, Wolff, Foster,
 Shepard and Donnelly
 1700 First National Bank Building
 St. Paul, Minnesota 55101

EDWIN VIEIRA, JR.
 12408 Greenhill Drive
 Silver Spring, Maryland 20904

Attorney for Petitioners

Done this sixteenth day of July, 1979.

PETITIONERS' APPENDICES

Supreme Court, U. S.

FILED

JUL 16 1979

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-754

LEON W. KNIGHT, et al., Petitioners,

v.

**THE HONORABLE GERALD W. HEANEY, UNITED STATES CIRCUIT
JUDGE OF THE UNITED STATES CIRCUIT COURT FOR THE
EIGHTH CIRCUIT, AND EARL R. LARSON AND DONALD D.
ALSOP, UNITED STATES DISTRICT JUDGES OF THE DISTRICT
COURT FOR THE DISTRICT OF MINNESOTA, Respondents.**

MOTION FOR LEAVE TO FILE
AND PETITION FOR WRIT OF
MANDAMUS AND/OR PROHIBITION

**EDWIN VIEIRA, JR.
12408 Greenhill Drive
Silver Spring, Maryland 20904**

**JOHN J. FOGARTY
8316 Arlington Boulevard
Fairfax, Virginia 22038**

Attorneys for Petitioners

Of Counsel:

**RAYMOND J. LAJEUNESSE, JR.
8316 Arlington Boulevard
Fairfax, Virginia 22038**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No.

LEON W. KNIGHT, *et al.*, *Petitioners*,

v.

THE HONORABLE GERALD W. HEANEY, UNITED STATES CIRCUIT
JUDGE OF THE UNITED STATES CIRCUIT COURT FOR THE
EIGHTH CIRCUIT, AND EARL R. LARSON AND DONALD D.
ALSOP, UNITED STATES DISTRICT JUDGES OF THE DISTRICT
COURT FOR THE DISTRICT OF MINNESOTA, *Respondents*.

MOTION FOR LEAVE TO FILE
AND PETITION FOR WRIT OF
MANDAMUS AND/OR PROHIBITION

PETITIONERS' APPENDICES

APPENDIX A

RELEVANT DOCKET ENTRIES



APPENDIX A

RELEVANT DOCKET ENTRIES

<i>Date</i>	<i>Entry</i>
12-19-74	Filed Complaint. Issued summons and 35 copies. Case assigned to 4th Judge, case card #235. • • • •
1-17-75	Filed notice of motion returnable 2-28-75 at 9:00 AM and motion of defts NEA, MEA, MCCFA, IMPACE and the named officers, directors and members to stay or dismiss with aff. of service by mail on 1-16-75.
1-30-75	• • • • Filed amended complaint and request for a three-judge district court with aff. of service by mail on 1-30-75. • • • •
2-13-75	Filed notice of motion returnable 2-28-75 at 9:00 AM and motion of pltf's to convene a statutory three-judge court with aff. of service by mail on 2-13-75. • • • • Filed plaintiffs' first set of interrogatories to defendant unions with aff. of service by mail on 2-13-75. • • • •
3-3-75	Entered record of hearing (Alsop, J) (Lindberg, R) motion of corporate defts to stay or dismiss. Argued, submitted & taken under advisement. Motion of pltf's to convene three judge court. Argued, submitted & taken under advisement. Motion of state official defts to suspend discovery. Counsel to stipulate & submit proposed order. Mr. Miller

*Date**Entry*

to submit responsive brief in 2 wks. Mr. Mullin may submit brief if he desires. Mr. Mark indicated he would not submit a brief.

- 3-17-75 Filed reporter's transcript of proceedings re: motion (Alsop, J) on 2-28-75 (Lindberg, R) (separate).

Filed stipulation and Order (Alsop, J) that all discovery is suspended pending final resolution of the motion to stay or dismiss. The parties may serve interrogatories, requests for admissions and schedule depositions, however, the responses thereto or the taking of depositions shall not occur until a reasonable time agreed to by the parties herein after final resolution of the motion to stay or dismiss.

- 3-31-75 Filed pltfs' second set of interrogatories to deft unions with aff. of serv. by mail on 3-28-75.

• • • •

- 10-24-75 Filed notice of motion returnable 11-3-75 at 9:00 AM with pltfs' motion to reopen discovery with aff. of serv. by mail on 10-21-75.

- 11-6-75 Filed Order (Magistrate Cudd) that plaintiffs' motion to vacate a stipulation and order suspending discovery pending final resolution of a motion to stay or dismiss is denied. (Dated 11-5-75).

Mailed notice to counsel.

- 12-23-75 Filed Memorandum and Order (Alsop, J) dated 12-22-75 as follows: IT IS ORDERED that plaintiffs' motion to convene a three-judge court be, and the same hereby is denied. IT IS FURTHER ORDERED that defendants' motion to stay or dismiss be, and the same hereby is denied.

Mailed notice to counsel.

<i>Date</i>	<i>Entry</i>
2-11-76	Answer of MCCFA, MEA, IMPACE, NEA, Norman, Durham, Bell, Minke, Chesebrough, Holman, Mondale, Rosasco, Provo, Gallop, Klinkerfues, Morgan, Schutt, Harris, Wise, Barett, Herndon, and Lambert.
3-18-76	Notice of motion and motion of pltfs for order directing defts to file objections and answers to pltfs' interrogatories, ret. 3-26-76 at 9:00 AM.
3-23-76	Notice and motion of debt-State officials to continue the suspension of discovery returnable at 3-26-76 at 9:00 AM. Affidavit of Richard G. Mark.
3-31-76	Order (Magistrate Cudd) that plaintiffs' motion to compel discovery is denied; defendants' motion to continue the suspension of discovery is granted. Notice to counsel.
5-20-76	Opinion from the Eighth Circuit Court of Appeals granting petition for writ of mandamus to compel the convention of a three-judge court. Notice to counsel.
5-26-76	Order (Floyd R. Gibson, Chief Judge, U.S. Court of Appeals for the 8th Circuit) hereby designates the Honorable Gerald W. Heaney, United States Circuit Judge, and the Honorable Earl R. Larson, United States District Judge for the District of Minnesota to serve with the Honorable Donald D. Alsop, United States District Judge for the District of Minnesota to hear and determine the action. Notice to counsel.

*Date**Entry*

6-10-76 Minutes of Proceedings (Alsop, J) (Lindberg, R) pltfs' motion that defts be directed to submit objections to interrogatories and for production by 7-9-76 and attorneys be directed to meet on 7-15-76 to discuss any differences that may arise, etc., argued & ordered that the court's order of 3-17-75 be vacated and Magistrate Cudd's order of 3-31-76 be vacated, defts shall furnish to pltfs on 7-9-76 objections to interrogatories, if there are no objections, defts shall answer on 8-9-76 & parties shall meet on 7-15-76 to discuss the objections and work out any problems with Mag. Cudd. Mr. Mullin to prepare order and submit to counsel and to the Court.

6-28-76 Order (Alsop, J) dated 6-24-76 as follows:

1. That the Order of the Court of March 17, 1975, signed by the undersigned, and the Orders of the Court of November 6, 1975 and March 31, 1976 signed by the Honorable Earl J. Cudd, Magistrate, are hereby vacated.
 2. That defendants shall file and serve objections to the interrogatories and requests for documents previously served by the plaintiffs on or before July 9, 1976.
 3. That attorneys for the parties shall meet on or about July 15, 1976 to resolve any differences among the parties raised by such objections.
 4. That defendants shall answer all interrogatories and requests for documents not objected to by August 9, 1976.
- Notice to counsel.

*Date**Entry*

7-14-76 Defendant employee organizations and their officers objections to pltfs' first set of interrogatories.

Deft. employee organizations and their officers objections to pltfs' second set of interrogatories.

• • • •

8-17-76 Stipulation and Protective Order (Magistrate Cudd) dated 8-16-76 re: production of documents and answers to interrogatories.

Notice to counsel.

1-10-77 Notice and motion of pltfs for an order directing National Education Assoc. and Minn. Education Assoc. to answer certain interrogatories and pay attorneys' fees, ret. 1-4-77 at 9:00 AM, with aff. of Wm. E. Mullin.

1-26-77 Notice of taking depositions of Ralph S. Chesebrough, Albert L. Gallop, Calvin Minke, Alfred F. Provo, James K. Durham, Donald Hill, Fulton B. Klinkerfues, John W. Schutt, Phillip C. Heland, Terry E. Herndon, John Ryor, and Treasurer of NEA.

3-3-77 MEA answers to pltfs' first set of interrogatories.

MEA answers to pltfs' second set of interrogatories.

IMPACE answers to pltfs' first set of interrogatories.

IMPACE answers to pltfs' second set of interrogatories.

MCCFA answers to pltfs' first set of interrogatories.

MCCFA answers to pltfs' second set of interrogatories.

*Date**Entry*

NEA answers to pltfs' first set of interrogatories.

NEA answers to pltfs' second set of interrogatories

Employee organizations and their officers answers to pltfs' first set of interrogatories.

• • • •

5-2-77 MCCFA, MEA, IMPACE, NEA and officers interrogatories to pltfs.—Set I.

5-20-77 Deposition of Fulton B. (F.B.) Klinkerfues on 3-15-77 (Ledford, R) (separate).

• • • •

10-13-77 Pltfs' first set of requests for admissions and interrogatories with exhibits A through O. (Separate).

• • • •

12-1-77 Stipulation and Order (Alsop, J) dated 11-30-77 that the defendant employee organizations and individual officers and the defendant state agencies and officials shall have until December 15 to interpose objections, or answer the plaintiffs' requests for admission.

Notice to counsel.

1-12-78 Stipulation and Order (Alsop, J) that defendant employee organizations and individual officers and the defendant state agencies and officials shall have until February 15, 1978, to interpose objections, or answer the plaintiffs' requests for admissions.

Notice to counsel.

2-21-78 Notice of taking depositions of Herbert Brownell, Gene Mammenga, Michael Sokup, Neil Sands,

*Date**Entry*

Roger Johnson, Gary Watts, Joseph Letorney, John F. Cox, Rosalyn H. Baker, and Stanley McFarland.

- 3-22-78 Stipulation and Order (Devitt, J) that the defendant employee organizations and individual officers and the defendant state agencies and officials shall have until March 31, 1978 to interpose objections, or answer the plaintiffs' requests for admissions.

Notice to counsel.

- 4-12-78 Defts' response to pltfs' requests for admissions.

- 4-20-78 Pltfs' request for production of documents to MCCFA, MEA, NEA and IMPACE.

• • • •

- 6-19-78 Request for production of documents by plaintiffs.

- 7-14-78 MCCFA, MEA, NEA and IMPACE response to pltfs' request for production of documents.

NEA's response to pltfs' request for production of documents.

MCCFA, MEA and IMPACE response to pltfs' request for production of documents.

• • • •

- 9-26-78 Order for Pretrial (Alsop, J) dated 9-25-78 returnable 10-13-78 at 9:30 AM before Judge Alsop.

Notice to counsel.

• • • •

- 10-17-78 Order (Alsop, J) dated 10-16-78 as follows:

It Is ORDERED that all discovery in this action be closed as of December 31, 1978, save and except plaintiffs' responses to defendants' contention in-

*Date**Entry*

terrogatories, which responses shall be served and filed on or before January 15, 1979.

IT IS FURTHER ORDERED that on or before January 30, 1979, the parties prepare, execute, and file with the court a stipulation of undisputed facts.

IT IS FINALLY ORDERED that a further pretrial conference be had in the above action on February 2, 1979 at 9:30 o'clock AM.

Notice to counsel.

- 10-26-78 Notice of taking deposition of James A. Harris.
Pltfs' interrogatory to deft. labor organizations.
Notice of taking deposition of Susan Lowell.
Notice of taking deposition of Robert Harman.
Notice of taking deposition of Ken Pratt.
Notice of taking deposition of Sue Zagrabelny.
Notice of taking deposition of Ken Bresin.
Notice of taking deposition of R. Dick Vander Woude.

• • • •
11-21-78 • • • •

Pltfs' request to Minn. Education Assoc. for production, inspection and copying of documents.

Pltfs' request to National Education Assoc. for production, inspection and copying of documents.

Pltfs' request to Minn. Community College Faculty Assoc. et al. for production, inspection, and copying of documents.

Pltfs' request to Independent Minn. Political Action Committee for Education for production, inspection, and copying of documents.

*Date**Entry*

- 12-5-78 Notice of taking deposition of Alice Morton.
 Notice of taking deposition of Matthew Reese.
 • • • •
- 12-20-78 Amended notice of taking deposition of Matthew Reese.
- 12-21-78 Notice and motion of National Education Assoc., its affiliates and its officials and staff personnel, to quash a certain subpoena issued against Mr. Matthew Reese, ret. 12-20-78 at 8:30 AM.
 Notice and motion of National Education Assoc., its affiliates and its officials and staff personnel to quash a certain subpoena issued against Ms. Alice Morton, ret. 12-20-78 at 8:30 AM.
 Minutes of Proceedings (Renner, Magistrate) (McNulty, R) deft MEA's motion to quash subpoena duces tecum of Alice Morton and Matthew Reese. MEA withdrew motion to quash subpoena of Matthew Reese. Pltf entered an objection to withdrawal of the motion. Pltf moved for an order extending discovery to allow depositions of Reese and Morton to be taken after December 31, 1978, if necessary, Arguments of counsel heard. Matter submitted and taken under advisement. Dated 12-20-78.
- 12-22-78 Order (Magistrate Renner) denying National Education Association's motion to quash subpoenas issued to Matthew Reese and Alice Morton.
 Notice to counsel.
 • • • •
- 1-12-79 Notice of pltf's motion to rescind order of 10-13-78 and granting other relief ret. 2-2-79 at 9:30 AM.

Date

Entry

. . . .

1-22-79 Affidavit of Karen Crutcher.

Affidavit of Edwin Vieira, Jr.

Affidavit of Barbara Yezek.

Affidavit of Thomas D. Logie.

Affidavit of Teresa R. Silzer.

Affidavit of Edwin Vieira, Jr., Re: Non-production
of correspondence file of Bresin.

Affidavit of Raymond J. LaJeunesse, Jr.

Affidavit of Edwin Vieira, Jr. Re: Production of
correspondence file of Letorney.Affidavit of Teresa R. Silzer Re: Production of
correspondence file of Letorney.Affidavit of Edwin Vieira, Jr. Re: Production of
correspondence file of Vander Woude.

Affidavit of John J. Fogarty.

Affidavit of Edwin Vieira, Jr. Re: Production of
correspondence file of Watts.

Affidavit of Emily Pitts Dixon.

Affidavit of Teresa R. Silzer Re: Production of
correspondence file of Watts.Affidavit of Raymond J. LaJeunesse, Jr. Re: Pro-
duction of documents in *Seay v. McDonnell Doug-
las Corp.*

. . . .

2-1-79 Notice and motion of pltfs to rescind Court's or-
der of 10-13-78 and for an order commanding pro-
duction of certain files maintained by, the depo-
sitions of certain staff-personnel of, and the pay-
ment of certain costs and fees, ret. 1-26-78 at 2:00
PM.

*Date**Entry*

.

- 2-5-79 Deposition of John E. Ryor taken 5-10-77 (Mattingly, R) (Separate).
 Deposition of John E. Ryor, Volume II, taken 5-11-77 (Mattingly, R) (Separate).
 Deposition of Terry E. Herndon taken 4-26-77 (Mattingly, R) (Separate).
 Deposition of Terry Herndon, Volume II, taken 5-18-77 (Mattingly, R) (Separate).
 Deposition of Terry Herndon, Volume III, taken 5-19-77 (Mattingly, R) (Separate).
- 2-13-79 Affidavit of Alice Morton.
- 2-16-79 Deposition of John Michael Sokup taken 8-28-78 (Wandzel, R) (Volume I) (Separate).
 Deposition of Kenneth Victor Bresin taken 11-16-78 (Belkengren, R) (Separate).
 Deposition of Sue Ellen Zagrabelny taken 11-17-78 (Belkengren, R) (Separate).
 Deposition of A.L. (Bud) Gallop taken 2-24-77 (Ledford, R) (Separate).
 Deposition of Herbert R. Brunnell taken 4-19-78 (Ledford, R) (Separate).
 Continued deposition of Gene Mammenga taken 6-13-78 (Wandzel, R) (Separate).
 Deposition of Kenneth L. Pratt taken 11-21-78 (Manke, R) (Separate).
 Deposition of R. Dick VanderWoude taken 11-20-78 (Ledford, R) (Separate).
 Deposition of Neil Frederick Sands taken 6-14-78 (Manke, R) (Separate).

*Date**Entry*

Deposition of Roger I. Johnson taken 9-7-78 (Ledford, R) (Separate).

Continued deposition of Roger I. Johnson taken 9-8-78 (Ledford, R) (Separate).

3-5-79 Pltfs' supplemental answers to United Teaching Profession's interrogatories.

3-8-79 Deposition of Gene Mammenga taken 6-12-78 (Wandzel & Ledford, R) (Separate).

. . . .

4-9-79 Order (Heaney, Larson, Alsop, J) dated 4-4-79 as follows:

IT IS ORDERED that the motion of the plaintiffs as hereinabove set forth be and the same hereby is in all things denied.

IT IS FURTHER ORDERED that the motion of the defendants National Education Association, Minnesota Education Association and their officers and staff as hereinbefore set forth be and the same hereby is in all things denied.

IT IS FURTHER ORDERED that on or before May 7, 1979 each of the parties meet, prepare, and enter into a stipulation of undisputed facts. On or before May 21, 1979 counsel for each party shall prepare, file and serve upon opposing counsel a statement setting forth all facts in issue which remain unresolved and which it proposes to submit to the court for determination. On or before June 4, 1979 counsel for each party shall prepare, serve and file a schedule of all exhibits which will be offered in evidence at the trial as part of its case in chief. On or before June 4, 1979 counsel for each party shall make for identification in the

*Date**Entry*

sequence proposed to be offered all exhibits intended to be offered at trial. On or before June 4, 1979 counsel for each party shall prepare, serve and file a schedule of depositions or portions thereof it proposes to offer in evidence. On or before June 4, 1979 counsel for each party shall prepare, serve and file a schedule of interrogatories and answers to interrogatories that it proposes to offer in evidence. On or before June 4, 1979 counsel for each party shall prepare, serve and file a full and complete statement of the facts it proposes to prove as part of its case in chief. On or before June 18, 1979 each party shall file a detailed written brief setting forth certain things.

It Is FINALLY ORDERED that a further hearing be conducted by the Court on the 29th day of June, 1979 at 9:30 AM at the Federal Courts Building in St. Paul.

Notice to counsel.

• • • •

4-23-79 Notice and Motion of Plaintiffs for Dissolution or Stay of Court's Order of 4-4-79 and for Reconsideration and Hearing on Plaintiffs' Motion to Rescind Court's Order of October 13, 1978.

• • • •

5-3-79 Deposition of John F. Cox, taken 7-26-78.

5-3-79 Deposition of Gary D. Watts, taken 7-18-78.

5-3-79 Resumed Deposition of Gary D. Watts, taken 7-19-78.

5-3-79 Deposition of Joseph A. Letorney, Volume I, taken 7-24-78.

5-3-79 Resumed Deposition of Joseph A. Letorney, taken 7-25-78.

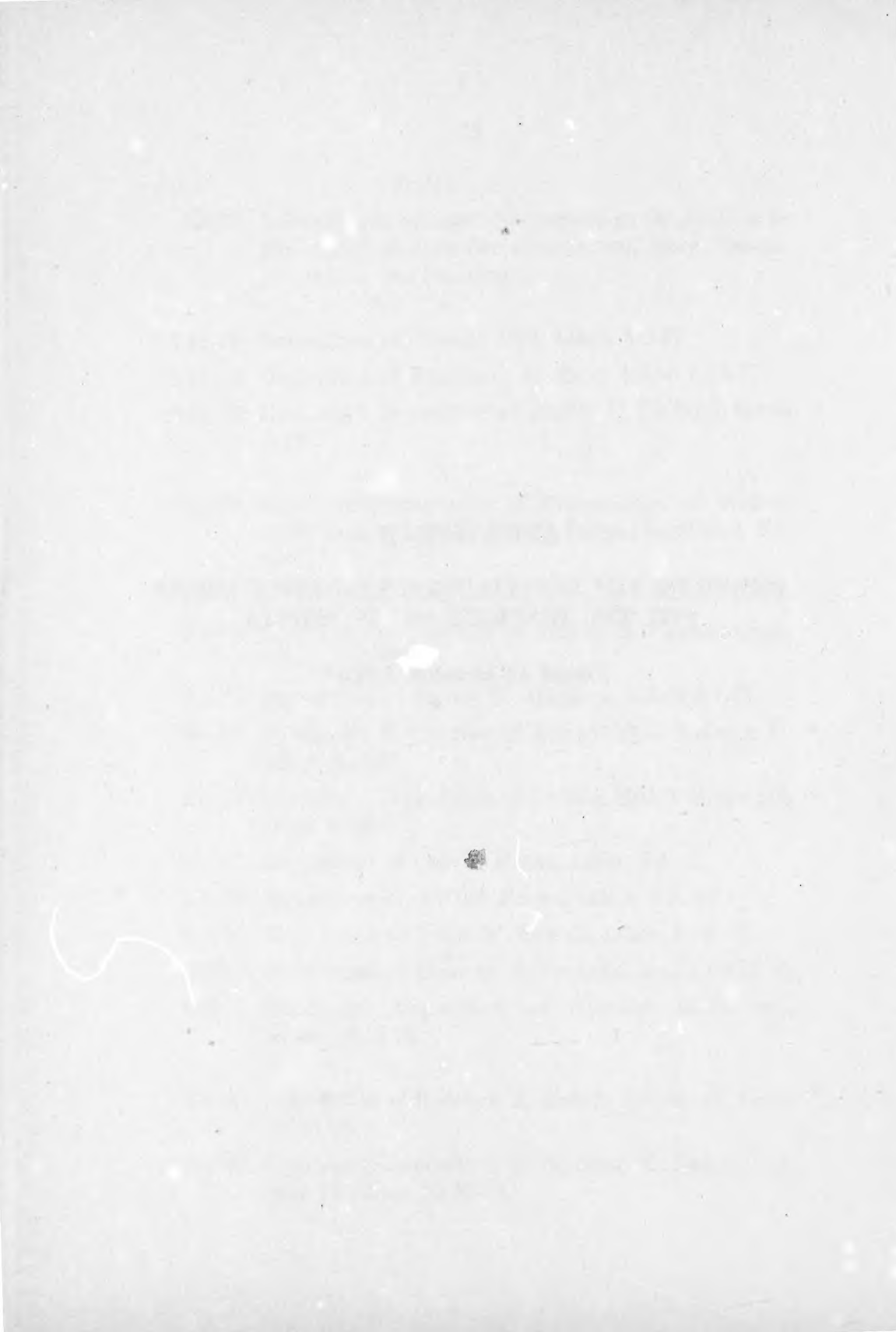
• • • •

<i>Date</i>	<i>Entry</i>
5-8-79	Labor Organizations' Statement in Opposition to Plaintiffs' Motion for Dissolution, Stay, Reconsideration and Hearing. • • • •
5-11-79	Deposition of Donald Hill, taken 3-9-77.
5-11-79	Deposition of Phillip C. Helland, taken 7-12-77.
5-11-79	Continued Deposition of Phillip C. Helland, taken 7-12-77. • • • •
5-21-79	Reporter's Transcript of Proceedings re: Motion of February 2, 1979. Alsop, Judge; Lindberg, Reporter.
6-5-79	Deposition of Ralph S. Chesebrough, taken 2-22-77.
6-5-79	Continued Deposition of Ralph S. Chesebrough, taken 2-23-77.
6-5-79	Deposition of James M. Durham, taken 3-7-77.
6-5-79	Continued Deposition of Donald Hill, Volume II, taken 3-11-77.
6-5-79	Continued Deposition of Donald Hill, Volume III, taken 3-12-77.
6-5-79	Deposition of Calvin Minke, taken 3-4-77.
6-5-79	Deposition of Alfred Provo, taken 3-31-77.
6-5-79	Deposition of John W. Schutt, taken 3-18-77.
6-8-79	Deposition of Stanley McFarland, taken 10-17-78.
6-8-79	Continued Deposition of Stanley McFarland, taken 10-18-78. • • • •
6-8-79	Deposition of Rosalyn H. Baker, Volume II, taken 10-19-78.
6-8-79	Continued Deposition of Rosalyn H. Baker, Volume II, taken 10-20-78.

APPENDIX B

**ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

Dated 16 October 1978



UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-74 Civ. 659

LEON W. KNIGHT, *et al.*, *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, *et al.*,
Defendants.

ORDER

WILLIAM E. MULLIN, Esq., Mullin, Weinberg & Daly, Minneapolis, Minnesota, and EDWIN VIEIRA, JR., Esq., Washington, D. C., appeared for plaintiffs.

ERIC R. MILLER, Esq., Oppenheimer, Wolff, Foster, Shepard and Donnelly, St. Paul, Minnesota, appeared for defendants MCCFA, NEA, MEA, IMPACE and the named officers, directors and members.

Warren Spannaus, Attorney General, State of Minnesota, by STEPHEN F. BEFORT, Esq., Special Assistant Attorney General, and DONALD J. MUETING, Esq., Special Assistant Attorney General, appeared for defendants Crippen, McVay, Sontorovich, Plunkett, Nycklemoe, Bruce, Helland, Helling, Lorenz and Denison.

The above-entitled matter came on for pretrial conference before the undersigned on October 13, 1978.

Upon all files, records and proceedings herein,

IT IS ORDERED That all discovery in this action be closed as of December 31, 1978, save and except plaintiffs' responses to defendants' contention interrogatories, which responses shall be served and filed on or before January 15, 1979.

IT IS FURTHER ORDERED That on or before January 30, 1979, the parties prepare, execute, and file with the court a stipulation of undisputed facts.

IT IS FINALLY ORDERED That a further pretrial conference be had in the above action on February 2, 1979 at 9:30 o'clock a.m.

DATED: October 16, 1978.

Respectfully submitted,

/s/ DONALD D. ALSOP

Donald D. Alsop

United States District Judge

APPENDIX C

PLAINTIFFS' MOTION TO RESCIND THE COURT'S ORDER OF 13 OCTOBER 1978, AND FOR AN ORDER COMMANDING THE PRODUCTION OF CERTAIN FILES MAINTAINED BY, THE DEPOSITIONS OF CERTAIN STAFF-PERSONNEL OF, AND THE PAYMENT OF CERTAIN COSTS AND FEES BY DEFENDANTS NATIONAL EDUCATION ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, AND INDEPENDENT MINNESOTA POLITICAL ACTION COMMITTEE FOR EDUCATION

Dated 30 December 1978

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF PHYSICS
530 SOUTH EAST ASIAN AVENUE
CHICAGO, ILLINOIS 60607
TEL. 773-936-5000
FAX 773-936-5000
WWW.PHYSICS.UCHICAGO.EDU

Book 50-1000-100

IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-74 Civ. 659

LEON KNIGHT, *et al.*, *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, *et al.*,
Defendants.

**PLAINTIFFS' MOTION TO RESCIND THE COURT'S ORDER
OF 13 OCTOBER 1978, AND FOR AN ORDER COMMAND-
ING THE PRODUCTION OF CERTAIN FILES MAINTAINED
BY, THE DEPOSITIONS OF CERTAIN STAFF-PERSONNEL
OF, AND THE PAYMENT OF CERTAIN COSTS AND FEES
BY DEFENDANTS NATIONAL EDUCATION ASSOCIATION,
MINNESOTA EDUCATION ASSOCIATION, MINNESOTA
COMMUNITY COLLEGE FACULTY ASSOCIATION, AND IN-
DEPENDENT MINNESOTA POLITICAL ACTION COMMITTEE
FOR EDUCATION**

Because of material changes in the circumstances of the above-captioned case since 13 October 1978, Plaintiffs Leon Knight, *et alia*, hereby move this Court to rescind its Order of that date, and to enter a new Order commanding the production of certain files maintained by, the depositions of certain staff-personnel of, and the payment of certain costs and fees by defendants National Education Association, Minnesota Education Association, Minnesota Community College Faculty Association, and Independent Minnesota Political Action Committee for Education.*

* Plaintiffs' Motion refers only to defendants National Education Association, Minnesota Education Association, Minnesota Community College Faculty Association, Independent Minnesota Political

The Court's Order of 13 October 1978 closed plaintiffs' discovery in this action as of 31 December 1978, and required plaintiffs to respond to defendants' contention interrogatories by 15 January 1979. Implicit in that decision was the presumption that prior to and following the date of the aforesaid Order, defendants had complied and would comply in good faith with plaintiffs' requests for discovery. However, since the entry of that Order:

1. Analysis of deposition-testimony of certain staff-personnel of certain of the defendants, and comparison of that testimony to other evidence in the record, indicates that several of these deponents, on numerous occasions in their testimony under oath, have not truthfully or completely answered questions put to them by plaintiffs. Evidence uncovered by private detectives engaged by plaintiffs supports this conclusion.

2. Certain defendants have withheld from production documents that plaintiffs have requested and to the production of which plaintiffs are entitled. These defendants have neither notified plaintiffs that any documents have been withheld, nor asserted any claim of privilege or other legal excuse with respect to any document in purported justification of defendants' failure to produce it.

In addition, certain deponents have denied their involvement in or any knowledge of the preparation or present existence of documents, material to the proof of plaintiffs' case, that describe plans relating to activities of certain defendants, their staff-personnel, and members in the 1976 elections. Evidence from other sources indicates those same deponents, or other of defendants' staff-personnel subject to their supervision, did prepare or have reason to know of the preparation or existence of such documents.

Action Committee for Education, and their officials and staff-personnel named as defendants in plaintiffs' Amended Complaint. The Motion does not involve the defendant State Officials; and no relief of any kind is sought with respect to them.

3. The record now indicates that defendants' denials of a substantial number of plaintiffs' Requests to Admit were either in bad faith or in willful disregard of defendants' duty under Federal Rule of Civil Procedure 36 to make reasonable inquiry of their own officials, staff-personnel, or employees to determine whether there was a basis in fact for any denial.

4. As a result of the conduct detailed in paragraphs 1 through 3, *supra*, defendants have distorted the record and denied plaintiffs material evidence relating to the activities of defendants, their officials, staff-personnel, and members in the campaigns of candidates for election to public office during the elections of 1972, 1974, 1976, and 1978.

If this Court does not take appropriate action, the aforesaid conduct of defendants will frustrate the development of a complete and accurate pre-trial record, resulting in injustice to plaintiffs, an unnecessary burden on the Court, or both.

WHEREFORE, on the basis of these and other facts known to defendants and that plaintiffs shall present and elaborate in detail in their Memorandum of Points and Authorities in support of this Motion, plaintiffs request this Court:

A. To RESCIND its Order of 13 October 1978 with respect to defendants National Education Association, Minnesota Education Association, Minnesota Community College Faculty Association, Independent Minnesota Political Action Committee for Education, and their officials and staff-personnel named as defendants in plaintiffs' Amended Complaint.

B. To ORDER the aforesaid defendants to supply plaintiffs with a list of all documents and other physical recordings of information, known to or reasonably ascertainable by defendants, that relate in any way to the campaigns of candidates for election to public office during the elections of

1972, 1974, 1976, or 1978; that defendants, their officials, staff-personnel, employees, or agents have maintained on file or in storage, at any time subsequent to 1 January 1972, at the National Education Association headquarters at 1201 16th Street, N.W., Washington, D.C., the Minnesota Education Association headquarters at 41 Sherburne Avenue, St. Paul, Minnesota, or any other location; and that defendants, their officials, staff-personnel, employees, agents, or counsel have caused or permitted to be destroyed.

C. FURTHER TO ORDER the aforesaid defendants to supply plaintiffs with a list of all documents and other physical recordings of information that defendants, their officials, staff-personnel, employees, agents, or counsel have used to prepare any witnesses for depositions and have not produced for inspection and copying by, or otherwise identified to, plaintiffs.

D. FURTHER TO ORDER the aforesaid defendants to make available for direct inspection by plaintiffs, without the intermediation of defendants, their staff-personnel, employees, agents, or counsel, and under the supervision of a Master or Referee appointed by the Court, the following files *: viz.,

1. the files of the Governmental Relations Department of the National Education Association;

* For the purposes of this Motion, the term "files" means all systems of document-storage or retention of other physical recordings of information that the particular Department, Goal Area, Support System, or Committee (a) maintains in its offices or any other location, or (b) has maintained in its offices or any other location at any time subsequent to 1 January 1972, but has caused or permitted to be transferred from its offices or other location to any other location or to the custody of any person, corporation, or unincorporated association known to or reasonably ascertainable by defendants, their officials, staff-personnel, employees, agents, or counsel.

2. the files of the Governmental Relations Department of the Minnesota Education Association;

3. the files of all Departments, Goal Areas, and Support Systems of the National Education Association under the supervision of Gary D. Watts, Director;

4. the files of the Field Operations Department of the Minnesota Education Association;

5. the files of the Communications Support System of the National Education Association;

6. the files of the Communications Department of the Minnesota Education Association;

7. the files of the National Education Association Political Action Committee;

8. the files of the Independent Minnesota Political Action Committee for Education; and

9. the Archives of the National Education Association.

E. FURTHER TO ORDER the aforesaid defendants to produce for deposition, before a Magistrate or other judicial officer appointed by the Court, the following persons: *viz.*,

1. Gene Mammenga, Director, Minnesota Education Association;

2. Stanley J. McFarland, Director, National Education Association;

3. Robert E. Harman, Associate Director, National Education Association;

4. Kenneth Bresin, Assistant Director, Minnesota Education Association; and

5. Gary D. Watts, Director, National Education Association.

F. FURTHER To ORDER the aforesaid defendants to produce for deposition the following persons: *viz.*,

1. A. M. ("Barney") Palmer, Assistant Executive Director, Minnesota Education Association;

2. Vaughn Baker, Political Education Consultant, National Education Association;

3. Howard Carroll, Legislative Specialist, National Education Association;

4. Kenneth Melley, Associate Director, National Education Association;

5. Leon Felix, Governmental Relations Consultant, National Education Association; and

6. such other person or persons as plaintiffs may request this Court hereafter to order defendants to produce for deposition, and the depositions of whom this Court shall find are warranted under the circumstances obtaining at that time.

G. FURTHER To ORDER the aforesaid defendants, their counsel, or both to pay plaintiffs the reasonable costs, including attorneys' fees, of the following activities: *viz.*,

1. the prosecution of this Motion;

2. all investigations made on behalf of plaintiffs in the State of Minnesota with respect to the activities of certain defendants and their staff-personnel in the 1978 elections in that State;

3. the depositions already had, and to be had, of the individuals named in paragraphs E. and F., *supra*; and

4. the inspection of all files identified in paragraph D., subparagraphs 1 through 4 and 6 through 8, *supra*, and copying of all documents from those files that plaintiffs may choose to copy.

G. AND FINALLY TO ORDER such other and additional relief
as the circumstances of this case warrant.

/s/ EDWIN VIEIRA, JR.
Edwin Vieira, Jr.
Attorney for Plaintiffs
12408 Greenhill Drive
Silver Spring, Maryland 20904
301-622-2804

/s/ JOHN J. FOGARTY
John J. Fogarty
Attorney for Plaintiffs
8316 Arlington Boulevard, Suite 600
Fairfax, Virginia 22038
703-573-7010

Dated December 30, 1978



APPENDIX D

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION TO RESCIND THE COURT'S ORDER OF 13 OCTOBER 1978, AND FOR AN ORDER COMMANDING THE PRODUCTION OF CERTAIN FILES MAINTAINED BY, THE DEPOSITIONS OF CERTAIN STAFF-PERSONNEL OF, AND THE PAYMENT OF CERTAIN COSTS AND FEES BY DEFENDANTS NATIONAL EDUCATION ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, AND INDEPENDENT MINNESOTA POLITICAL ACTION COMMITTEE FOR EDUCATION *

Dated 17 January 1979

* *N.B.* All internal page-numbers and page-references in this document have been conformed to the pagination used in these Appendices.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-74 Civ. 659

LEON KNIGHT, *et al.*, *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, *et al.*,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION TO RESCIND THE COURT'S ORDER OF 13 OCTOBER 1978, AND FOR AN ORDER COMMANDING THE PRODUCTION OF CERTAIN FILES MAINTAINED BY, THE DEPOSITIONS OF CERTAIN STAFF-PERSONNEL OF, AND THE PAYMENT OF CERTAIN COSTS AND FEES BY DEFENDANTS NATIONAL EDUCATION ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, AND INDEPENDENT MINNESOTA POLITICAL ACTION COMMITTEE FOR EDUCATION

EDWIN VIEIRA, JR.
12408 Greenhill Drive
Silver Spring, Maryland 20904

JOHN J. FOGARTY
8316 Arlington Boulevard
Fairfax, Virginia 22038

WILLIAM E. MULLIN
2200 Dain Tower
Minneapolis, Minnesota 55402

Of Counsel:

RAYMOND J. LAJEUNESSE, JR.
8316 Arlington Boulevard
Fairfax, Virginia 22038

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IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-74 Civ. 659

LEON KNIGHT, *et al.*, Plaintiffs,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASS'N, *et al.*,
Defendants.

INTRODUCTION

Because of material changes in the circumstances of this case since the hearing of 13 October 1978, plaintiffs have moved the Court to rescind its Order of that date, and to enter a new Order commanding the production of certain files maintained by, the depositions of certain staff-personnel of, and the payment of certain costs and fees by defendants National Education Association (NEA), Minnesota Education Association (MEA), Minnesota Community College Faculty Association (MCCFA), and Independent Minnesota Political Action Committee for Education (IMPACE).¹

Part I. of this Memorandum, *infra* pp. 46-83, explains why the instant motion is important and timely to the proper prosecution of this case at trial and on appeal. Parts II. through IV., *infra* pp. 83-323, describe various activities of defendants and their staff-personnel, preju-

¹ Plaintiffs' Motion and the facts and arguments set forth in this Memorandum refer only to defendants NEA, MEA, MCCFA, IMPACE, and their officials and staff-personnel named as defendants in plaintiffs' Amended Complaint. Neither the Motion nor this Memorandum involves the defendant State Officials; and plaintiffs seek no relief of any kind with respect to them.

dicial to plaintiffs, that necessitated this Motion. And Part V., *infra* pp. 323-31, details the necessity for the relief that Motion requests.

In summary, plaintiffs' position is that: (i) Implicit in the Court's Order of 13 October 1978 was the presumption that theretofore and thereafter defendants NEA, MEA, MCCFA, and IMPACE had complied and would comply in good faith with plaintiffs' requests for discovery, in terms of responding to plaintiffs' Requests to Admit and agreeing to stipulations of undisputed facts, of producing for inspection and copying documents and other physical evidence in defendants' possession, and of making available witnesses who would testify truthfully and completely as to defendants' political and other activities. (ii) The record shows, however, that defendants' conduct has been inconsistent with the Court's presumption of good faith on their part. And therefore, (iii) plaintiffs are entitled to an Order commanding such further discovery as shall complete and clarify the record and obviate a protracted trial of the factual issues raised in their Amended Complaint.

In the text that follows, plaintiffs have collected and reproduced, for the convenience of this Court, pertinent quotations drawn from the various depositions and documents upon which they rely. For this reason, the Memorandum is lengthy. But its length represents a significant saving of time and energy for the Court, which otherwise would have to turn, again and again, to the extensive record in this case to track down one or another bit of evidence. This Memorandum also represents a substantial condensation and systematization of the factual material now available in the record, which will materially aid any other Court that might have occasion to review the issues raised herein.

In addition, plaintiffs have collected in any Appendix of Documents copies of all record-references they cite in the text, again for the Court's convenience. There is also an

Appendix of Affidavits, containing sworn statements from plaintiffs' counsel and their assistants concerning various phases of the discovery-process in this case.

SUMMARY OF ARGUMENT

The defendants named in plaintiffs' Motion constitute a political-action organization for all purposes of constitutional law under the First and Fourteenth Amendments. The decisions of the Supreme Court in *Elrod v. Burns* and *Abood v. Board of Education* disqualify such an organization from purporting to act, under color of state law, as the "spokesman" for plaintiffs or any other dissenting public employees.*

That defendants do constitute a political-action organization, their own publications and statements, the opinion of an expert in organizational analysis, and the public media attest. Furthermore, plaintiffs have amassed considerable evidence to support their allegations. Defendants' misconduct throughout the course of discovery, however, has thwarted the development of a complete factual record detailing the full extent of their political involvement, particularly with respect to the campaigns of candidates for election to public office; impeded the proper adjudication of plaintiffs' constitutional claims; and thereby delayed entry of the judgment to which plaintiffs are entitled under *Elrod* and *Abood*, to their considerable cost.

Defendants' misconduct has taken several forms. First, they have denied substantial numbers of plaintiffs' Requests to Admit in bad faith or willful disregard of their duty under Federal Rule 36 to investigate the factual basis

* *Elrod v. Burns*, 427 U.S. 347 (1976); *Abood v. Board of Educ.*, 431 U.S. 209 (1977). Defendants claim to act as the "exclusive representative", or "spokesman", for plaintiffs under color of Minn. Stat. §§ 179.61 *et seq.*

for any denial. And they have refused to stipulate to facts that the record in this case, and the public record, establish.

Second, they have withheld substantial amounts of relevant documents that plaintiffs requested they produce pursuant to Federal Rules 34 and 45, and have provided plaintiffs with neither notice nor legal excuse for such withholding.

Third, several of defendants' staff-personnel whom plaintiffs deposed have testified falsely or incompletely concerning the involvement of defendants, their affiliates, officials, staff-personnel, and members in the campaigns of candidates for election to public office in 1972, 1974, 1976, and 1978. Moreover, investigation by private detectives has disclosed that this untruthful testimony is part of a design to conceal from plaintiffs and this Court defendants' substantial political activities.

Defendants' misconduct entitles plaintiffs to an Order from this Court granting them direct access to certain of defendants' files, compelling the depositions of certain of defendants' staff-personnel, and awarding plaintiffs costs and attorneys' fees for all expenses incurred in exposing and correcting defendants' malfeasance in discovery.

ARGUMENT

- I. Although Plaintiffs' Theory of the Case and Previous Litigation in the Supreme Court on Related Issues Establish the Propriety of and Need for Comprehensive Discovery in This Action, and Although Plaintiffs Have Diligently Pursued Discovery Since Fall, 1976, Nevertheless Defendants Have Improperly Thwarted the Development of a Complete Factual Record.**

Plaintiffs' fundamental theory is that defendants NEA, MEA, MCCFA, and IMPACE, together with certain affiliated organizations and structures such as the National Education Association Political Action Committee (NEA-

PAC) and UniServ [1]², constitute a single, integrated organization that styles itself the United Teaching Profession (UTP) and engages in myriad activities throughout the State of Minnesota and the United States generally. Furthermore, the UTP has been and is involved to a substantial degree in various political activities at the local, state, and national levels, including the campaigns of candidates for election to public office, lobbying and other attempts to influence governmental action, propaganda and agitation, litigation, and coalitions with sundry political organizations, groups, and movements.³ The UTP's political activities are not only substantial in degree, but also essential, in the organization's own view, to the success of its goals, objectives, and programs.⁴ Because of its substantial and essential involvement in political activism, the UTP constitutes a political-action organization indistinguishable, for purposes of constitutional law under the First and Fourteenth Amendments, from a traditional political party. And therefore, applying the Supreme Court's decision in *Elrod v. Burns*, the Minnesota Public Employment Labor Relations Act (PELRA) is unconstitutional as applied, in so far as it requires plaintiffs, as a condition of employment in the Minnesota Community Colleges, to accept the UTP or any unit or level thereof as their "spokesman" for any purposes—including the negotiation of terms

² "UniServ" is a cooperative service arrangement among the local, state, and national levels of the United Teaching Profession. Document [1] in the Appendix of Documents describes its structure and character. NB: All numerical references in brackets—[—] and [—, p. —]—refer to documents, and pages therein, collected in the Appendix of Documents.

³ On the characterization of these activities as "political", see Vieira, "Are Public-Sector Unions Special Interest Political Parties?", 27 *DePaul L. Rev.* 293, 323-44 (1978).

⁴ On the definitions of "substantial" and "essential" used herein, see *id.* at 344-49.

and conditions of employment and adjustment of grievances with the community-college Board or its agents.⁵

Since, as Parts, I.A. and I.C., *infra* pp. 49-68 and 80-83, demonstrate, numerous sources support their factual allegations, plaintiffs are entitled under the Federal Rules of Civil Procedure to comprehensive discovery unburdened by any attempts on defendants' part to impede development of, or to distort or confuse, the record.⁶ In addition as Part I.B., *infra* pp. 69-80, discusses, previous litigation in the Supreme Court on issues related to those plaintiffs raise here establishes plaintiffs' entitlement to full disclosure from defendants as a matter, not only of plaintiffs' right, but also of sound administration of judicial resources.

However, Parts II. through V., *infra* pp. 83-331, show that plaintiffs, through no fault of their own, have not received full disclosure from defendants. Rather, quite the opposite is true. And if not remedied by an Order from this Court, defendants' activities will have two results: First, they will prevent plaintiffs from presenting their

⁵ *Elrod* held that government could not constitutionally require non-policy-making public employees, as a condition of their employment, "to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party". 427 U.S. 347, 355 (1976) (opinion of Brennan, J.).

⁶ The basic philosophy of the Federal Rules is that "prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged". 8 Wright & Miller, *Federal Practice and Procedure: Civil* § 2001, at 15.

⁷ "These Rules . . . set up a machinery by the operation of which a cause reaches actual trial . . . with a record already complete . . ." *Teller v. Montgomery Ward & Co.*, 27 F. Supp. 938, 941 (E.D. Pa. 1939).

constitutional claims in the context of a factual record that documents with particularity the extensive political activism of the UTP. Second, they will materially impede the progress of this litigation—forcing upon this Court a lengthy and complex trial, or requiring the Supreme Court on appeal to remand the case for further factual findings.*

A. ITS OWN ADMISSIONS; SCHOLARLY ANALYSIS OF ITS ORGANIZATIONAL STRUCTURE, ACTIVITIES, AND ESSENTIAL NATURE; AND COVERAGE IN THE PUBLIC MEDIA ALL ATTEST THAT THE UNITED TEACHING PROFESSION IS A POLITICAL ORGANIZATION, AS PLAINTIFFS ALLEGE.

Far from being based on “speculation”, as defendants’ counsel have contended throughout the course of this litigation, plaintiffs’ allegation that the UTP is a political-action organization rests upon the firmest of foundations, including numerous admissions of the UTP itself, scholarly analysis of its activities and character, and reports in the public media.

1. *The United Teaching Profession has regularly boasted of its political intentions and accomplishments.*

The literature of the UTP is replete with references to its substantial and essential involvement in political activism of all kinds. For the purposes of the instant motion, however, plaintiffs need refer the Court only to representative organizational statements describing its intentions and accomplishments in the realm of partisan poli-

* Constitutional questions are almost never ripe for decision in the absence of a detailed factual record. *E.g.*, *Shaffer v. Heitner*, 433 U.S. 186, 220-22 (1977) (Brennan, J., concurring and dissenting); *Wheeler v. Barrera*, 417 U.S. 402, 426-27 (1974); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 586-87 (1972); *Cowgill v. California*, 396 U.S. 371, 372 (1970) (Brennan and Harlan, JJ., concurring).

tics: that is, activities relating to the internal affairs of political parties and to the campaigns of candidates for election to public office.

During the period 1972 through 1978, the UTP regularly published articles in its newspapers and newsletters that document the extent and importance of partisan politics in and to its goals, objectives, and programs.* For example, MEA literature reiterates the typical organizational slogan: "Every educational decision is a political decision." [3] By this, the UTP imports that political officials or bodies, elected or appointed, make decisions that crucially affect the achievement of its goals at the local, state, and national levels—including school boards, state boards of education, state legislatures, governors, the United States Congress, the President of the United States, and even the Supreme Court. [4] Moreover, implicit in such slogans is the organization's intention to maximize its influence over all branches of government from the local level to Congress, the Presidency, and the Supreme Court. [5] This intention is also a characteristic theme in statements of UTP leaders.

In 1972, for instance, NEA President Catharine Barrett used the UTP News Service to inform the organization that

[p]olitical action is my top priority as NEA president. I believe strongly that collective political action by teachers and their education associations is the only way to get adequate consideration for education on the local, state and national levels. Only through effective political action can we have an impact on the Congress * * *. [6]

* For a detailed study of the publications of the NEA alone over the time period 1969 to 1976, see C. T. Shotts, "The Origin and Development of the National Education Association Political Action Committee, 1969-1976", Ph. D. Dissertation, Indiana University (1976). [2]

An MEA editorial boasted that, in the 1972 elections in Minnesota, "teachers were there".

Teachers were there in precinct caucuses, county, state and national conventions.

Teachers were there at fund raisers, at coffee parties, on telephones calling, walking door to door canvassing and talking.

Teachers were there in 80 percent of all legislative campaigns.

Teachers were there when 118 legislators requested and received substantial, badly needed financial contributions for their election campaigns.

Teachers were there doing many things that teachers have never done before. This was a new breed who were discovering in time the realities of political survival in a profession in which the major decisions are political decisions. [7]

And William Schneider, Chairman of the MEA Governmental Relations Council (MEA-GRC), observed that

the political activities of individual teachers, local associations, UniServ units, the GRC and IMPACE . . . really made the difference in the past election. We put it all together—we flexed our political muscle and it made a difference. [8]

In 1973, NEA President Helen Wise remarked that "[t]he thrill of leading the NEA" derived from knowing

that the teacher activist movement is under way in varying degrees in every state in the nation, and knowing that the NEA is really in motion. When this gigantic machine starts to move, nothing will stop it. [9]

She described with excitement

the tremendous ground swell of teacher activism that is making NEA a potent force in the political arena. Teachers everywhere are contributing their time, talents, and money to achieve the political clout we must have to elect candidates * * *. [10]

And at the National Press Club in Washington, D.C., she warned that

[t]hose who fail to hear us * * * will pay the political price. * * *

The two million members of the profession that depends for its life on the actions of elected politicians have awakened, like a slumbering giant, and have decreed that collectively they will take steps to change what must be changed.

In 1972, organized teachers helped elect about one-third of the House of Representatives, and more than one-third of the 33 candidates elected to the Senate. * * *

That was just for openers. Perhaps we never realized we could be so influential. But now, we have won our spurs, we are ready to undertake massive state-by-state grass roots campaigns that will guarantee the victories we need in the 1974 Congressional elections, not under party banners, but under the banner of education * * *. And, come 1976 we will put a friend of education in the White House.

For teachers have realized * * * that they are part of the most political of all professions—everything we do, * * * all major decisions about our profession are made by politically elected, lay people—school boards, legislators and congressmen.

And although we know that we can (and will if necessary) put teachers on the Capitol steps and in the halls

of every state legislature until our voice is heard, we also know that we cannot translate that voice into legislation that recognizes education as the foremost human priority of America if we continue to elect men and women who ignore that priority.

Two million school teachers are a political force to be reckoned with. [11]

That same year, at the state level, MEA President William Mondale echoed similar sentiments when he asked MEA members to consider that the organization's

political maturation process is projecting us more and more as a true political force at all levels, from the local school board through the state and national legislatures.

. . . .

[T]his level of increased political effectiveness must not be a plateau upon which we rest. There is more personal political commitment needed to complement the financial commitment many of us made in IMPACE. The enrolling of MEA members in IMPACE is continually growing—even in a non-election year. And the forecast is clearly more of the same.

. . . .

The combination of the growing strength of IMPACE and the increasing personal commitment of teachers to pro-education legislators * * * promise the further escalation of MEA's political effectiveness. [12]

In 1974, before the general election, NEA President James Harris declared that

[e]ducation is in *the political arena*, and I intend to keep it there. Every politician in the country now knows that teacher power is necessary for a successful campaign. This will be even more true in the future.

• • • [S]ome legislators have voted against every education measure presented to them. The direction ahead is clear: NEA-PAC-endorsed legislators on all levels must hold a substantial majority before we can withstand veto power and thus achieve a major breakthrough in political action. Teachers in America have an unprecedented opportunity to influence the upcoming elections. [13]

Subsequent to the elections, Harris reported that "[t]he education profession has proven in this election that it is a first-rate power in the political arena"; "we consider our successes at the polls a mandate to put a friend of education in the White House". [14] Harris also paid special tribute to the tens of thousands of UTP members who were politically active in candidates' campaigns:

Our political operation, like that of no other organization, is a grassroots endeavor. We are part of every community, every precinct, in the nation. [15]

Stanley McFarland, Director of the NEA Governmental Relations Department (NEA-GRD), concurred in predicting that

[s]ometime in this decade, the NEA is going to have more political resources, including volunteers and other campaign contributions, than any other single union—even more than the AFL-CIO. We may even do it by 1976. [15]

NEA Executive Director Terry Herndon also expressed his desire for "the meaningful involvement of teachers • • • in the partisan political process that makes our government go". [16] MEA President Mondale bragged that "MEA exhibits ever-growing program strength and expanding power, including: • • • education's most effective political machine in history—as is evident in repeated observations by politicians and reports in the news media". [17] And the

MCCFA reported that the IMPACE "has helped the MEA, and its members become a power to be reckoned with in the legislature". [18]

In 1975, NEA President Harris noted that

[t]eachers are now recognized as one of the most formidable forces in national politics. We are rivaling—and in some cases even surpassing—in political influence other major national organizations which have been in this business a lot longer than teachers have. Political action and legislation are key factors in educational strategies on the local, state, and national levels * * *. [19]

Declared NEA Executive Director Herndon at the National Press Club, there is "an absolute need and responsibility to exert maximum influence on the political system". [20] "Our political success story in the 1974 elections", he told UTP members,

must repeat itself in every election year if American public education is to be properly funded and organized. One year's victory will fade very rapidly into history if teachers slacken efforts in this arena. Adequate funding [through UTP members' dues-monies], especially as we approach our first Presidential endorsement in 1976, is critical. [21]

"Teachers shouldn't have to apologize for being active politically" was also the message conveyed by MEA President Don Hill. Added Hill, "[t]he MEA is active and organized and really involved in the political process in Minnesota". [22] "If my comments * * * seem to belabor the need for our political involvement", MEA Executive Director A. L. Gallop told the MEA convention,

it is only because I am convinced that much of the future of our great profession will be determined initially at the polling places and later in the legislative and

congressional halls, and ultimately in the Oval Office in the White House.

• • • •

While the MEA is criticized on the editorial pages for being too powerful, and by politicians for throwing our weight around, and by school board members for wanting to control education, and by parents for putting personal concerns first, I can only say that they haven't seen anything yet. [23]

"We teachers", said Gallop, "will continue to pack the precinct halls and the county, state, and national conventions because of our belief in the importance of both education and the political process". [24]

In 1976, NEA President John Ryor emphasized that "the movement is underway; the teachers of this country *are* a major political power in America". [25, p. 3] "Today", Ryor told UTP members,

We have more than rhetoric, more than goals. We have the tools to solve our problems—tools such as • • • plans of political action • • • . With these tools—developed and polished through years of work and testing—we have the opportunity to build our profession and make it the strongest in the nation. We can • • • elect friends of education and un-elect foes of the schools • • • . We can do these things, and our heritage tells us that we must do them. [26]

UTP newsletters also reported that the organization's members

are clearly emerging this election year as one of the most powerful forces in the nation's political process. Responding to the fact that education is controlled by the decisions of elected officials at all levels, teachers are working in record numbers to elect pro-education candidates. NEA and state and local affiliates are co-operating through shared staffing and other programs

to provide training and organizing assistance to the growing army of teachers now permanently hooked on the excitement of political involvement.

• • • •

The new federal election law limits NEA contributions to \$5,000 per candidate. But what teachers can really deliver to their favorites at all levels is not money power, but *people* power.

Teachers—articulate, respected, persuasive individuals, perfectly distributed in every town and hamlet in America—make uniquely effective block captains, phone bank organizers, get-out-the-vote workers, canvassers. Teachers who volunteer for these and the many other nuts-and-bolts political chores that need to be done provide their candidate with a service money can't buy. The success of teacher power in 1974, when better than four out of five teacher-backed candidates were elected to Congress, was not lost on this year's hopefuls, who are now actively wooing association support. [27]

Moreover, NEA President Ryor predicted,

[o]nce again NEA will be heard through its teacher delegates [at the national political-party conventions]. And what the politicians will hear is that we fully intend to accomplish our goals, with their help or without it, with their votes or over their vetoes. It makes no difference any more because in the long run we are going to achieve those goals. [25, p. 3]

Later, following the 1976 general elections, the UTP reported how its members

showed their political power • • • by helping to elect the Carter-Mondale ticket and by working to send to Congress more than four out of five teacher backed candidates.

. . .

In the wake of the close Presidential vote, Carter campaign director Hamilton Jordan stressed the importance of NEA's involvement. "The Carter campaign is particularly grateful for the extensive nationwide support received from NEA and its affiliates," Jordan said. "The massive support from teachers was critical to our winning this very close election. All over the nation, we turned to the NEA for assistance. We asked for their help, and they delivered." [28]

And in a press release, the UTP described how "winning candidates laud teacher power in wake of election". [29]

MEA Executive Director Gallop also boasted that

the teaching profession set another all-time record both in the number of dollars collected for political activity and for its determination to play a significant role in deciding not only who will occupy the Oval Office in the White House but in the election of friends of education at both the state and the Congressional levels. In short, the teaching profession took a giant step toward achieving political maturity.

Today, through the MEA, teachers possess power and influence far beyond any time in Minnesota's history. In fact, we have a reputation for getting things done; for being aggressive; for acting when others falter * * *. [30]

Asked about the political role of the MEA and its image, Director of the MEA Governmental Relations Department (MEA-GRD) Gene Mammenga responded that the MEA has

the reputation of being a powerful organization. We have a reputation of being an organization that can deliver money and bodies all over the state. * * *

But if we are characterized as being powerful, we better be powerful. If we are accused of having muscle—and I think the general public believes we do—then the muscle had better be there. It can't be there unless it's present all over the state. And it's got to be there in the sense that each local teacher knows what's going on.

. . . .

The problem is to maintain the momentum * * *. No battles are ever won politically because the chances of facing reversal are always present; our organization has got to remain continually strong.

. . . .

[I]f we're not at those [political-party] caucuses, somebody else will be there and control them. If we're not at the district conventions helping write the platform, somebody else will be doing that. The fight has to go on. [31]

"There is no realistic alternative to remaining politically powerful and politically vigilant", concluded Fulton Klinkerfues, Chairman of the MEA's "political-action arm", IMPACE:

We must begin to do a better job of learning how to mold and influence political opinion in our local communities.

We must continue to be active in party activities from precinct caucus to National Convention; to influence not only who is nominated for political office but what the party stands for. We must become more active in helping good people get elected at campaign time. The role of interested, informed spectator is simply not enough. Legislators need bodies to get jobs

done at election time and we have the educational manpower to do the job.

Last, we must continue to be strong financially. IMPACE is a symbol of that financial strength. * * * [W]e need to push IMPACE contributions harder than we have ever pushed them before. [32]

In 1977, NEA President Ryor spoke of "a victory for teacher power", when he recalled that,

[d]uring the '76 campaign, the media referred to the "fast-rising" NEA. They wrote of NEA's "push to get pedagogues into partisan politics" and of our "historic leap into Presidential politics." They were correct in asserting that "the powerful National Education Association * * * will make its voice heard."

The 1976 elections were in large part victories by teachers for educational and public employees. The critical role played by teachers in the Carter victory can be seen in many states, for example, Pennsylvania, Ohio, and Florida, to name three. That success was generated by an organization that is unique in having well-educated, articulate, and dedicated men and women in every voting precinct of our far-flung nation. As we proudly review the recent past, we must keep in mind that it is only through the responsible use of our political strength that we will achieve our long-range goals. [33]

And NEA Executive Director Herndon told the UTP's convention that the response to "regressive court decisions" and other political problems

must be to organize, mobilize, and act; to move forward with confidence, tenacity, and zeal; to move into the political arena and elect office-seekers who will be responsive to education.

• • • •

NEA must organize and mobilize 2 million teachers to carry the fight into every precinct, every political campaign, every school board election, every legislative session in the nation. This can be done only through the organizations of the united teaching profession—decisive and strong. There is no other way. [34]

Finally, in 1978, the NEA Special Committee on Financial Evaluation reminded UTP leaders that "NEA has taken giant steps—successful ones—in the political arena in recent years". [35] An NEA advertisement quoted NEA President Ryor as saying that

the political clout of NEA and its affiliates is being felt all over the country, not only as an effective lobbying group, but also as a pivotal influence in electing friends of education to local, state, and national legislative posts. [36]

And the UTP's national-level newspaper once again reported on the role of the organization's members throughout the nation in the campaigns of candidates for election to public office. [37]

In short, in each year from 1972 through 1978, the UTP itself has admitted to substantial involvement in political activism at the local, state, and national levels across the country. None the less, although the foregoing admissions establish that plaintiffs' factual allegations as to the political character of the UTP are sound, they only begin to document the pervasiveness of the organization's involvement in electoral politics over the years. And therefore they cannot limit plaintiffs' right to establish in full detail what the UTP, its officials, staff-personnel, and members have done to aid the campaigns of candidates in the 1972, 1974, 1976, and 1978 elections. This is particularly true in light of repeated threats by defendants' counsel to repudiate the or-

ganization's publications and to demand that plaintiffs prove at trial the factual basis of every statement appearing therein.¹⁰

2. *An expert in organizational analysis has testified that the United Teaching Profession is an integrated organization substantially and essentially involved in political activism.*

The UTP's publications and statements of its leaders are not the only obvious support for plaintiffs' theory of the case. Scholarly opinion is in accord as well. Dr. Craig E. Schneier, Assistant Professor of Organization Behavior and Personnel Administration at the University of Maryland, has testified under oath, as an expert witness retained by plaintiffs, that the UTP is essentially a political organization.

On the basis of his academic training, his experience as a private consultant in the area of organizational behavior

¹⁰ An example of these threats on the record appears in the deposition of MEA-GRD Director Gene Mammenga. [38] The colloquy is between Mr. Goodwin, counsel for defendants, and Messrs. Vieira and Mullin, counsel for plaintiffs:

MR. GOODWIN: We have never represented that the Advocate says in any way, shape or form exactly what is going on in the organization. I will state for the record that a lot of it's puffery for purposes of the communication with the membership.

MR. VIEIRA: How do you know that, Counsel? Shall we call you as a witness or perhaps make you a defendant with respect to this case?

MR. GOODWIN: I just made the statement. If you want to ask Mr. Mammenga that question, go ahead.

MR. MULLIN: We hope you will use it as puffery for purposes of trial.

MR. GOODWIN: I'm sure you do. I just wanted to indicate on the record that we do not accept any bald assertion that everything that's put in here is absolute truth. So don't be surprised if that objection is raised at trial.

and analysis, his review of the scholarly literature of organizational science, and his perusal of numerous UTP documents supplied by plaintiffs, Dr. Schneier offered his expert opinion that: (i) The UTP is a formal, complex organization consisting of various "units" or "levels", of which the NEA constitutes the national level, and the MEA and the MCCFA are representatives of numerous affiliates at the state and local levels, respectively. (ii) The UTP has differentiated itself into units operating at the local, state, and national levels in order to deal effectively with various jurisdictions of government, including local school boards, state legislatures, and the United States Congress. (iii) Although geographically differentiated, each unit of the UTP is an integral element of a single, nationwide organization; from the perspective of organizational science, NEA, MEA, MCCFA, NEA-PAC, IMPACE and UniServ (the cooperative service arrangement among the local, state, and national levels) are not separate and independent entities, but interdependent parts of the same entity. (iv) Political activism—in terms of partisan politics, lobbying, propaganda and agitation, litigation, and coalitions with other political groups—is pervasive throughout the UTP, constituting (for example) a substantial proportion of all activity within each of the goal areas and support systems of the NEA.¹¹ And (v) from the organization's own point of view, political activism is essential to the achievement of the UTP's goals, objectives, and programs. [40]

Nevertheless, although such expert opinion bolsters plaintiffs' contentions as to the political character of the UTP, it cannot substitute for the complete documentation to which plaintiffs are entitled. Indeed, plaintiffs should have the opportunity to discover additional facts to support the expert's opinion, rather than relying on that opin-

¹¹ The "goal areas" and "support systems" of the NEA are the basic organizational sub-structures through which the national level of the UTP carries out its activities. [39]

ion alone. This is particularly true in light of defendants' denial of plaintiffs' Request to Admit that the UTP has been and is substantially and essentially involved in partisan politics, lobbying, propaganda and agitation, litigation, and coalitions with other political organizations, groups, and movements. [41]

3. *The public media have reported on the deep involvement of the United Teaching Profession in politics.*

Plaintiffs' theory of the case finds support not only in admissions of the UTP and scholarly opinion as to its political character, but also in public notoriety surrounding its extensive political activism.

For example, in 1975 nationally syndicated labor-columnist Victor Reisel wrote (and the NEA and MEA quoted with approval) that the UTP "has suddenly grown into a fiercely aggressive, heavily integrated union", and described it as a "conflux of coming political power, giant membership, intense organization". [42] That same year, the UTP's national-level newspaper reprinted an article by *New York Times* political columnist A. H. Raskin entitled "Teachers Now Lions in Political Arena". "Both privately and in public statements", Raskin reported,

politicians tend to put high value on campaign support by teachers. This is partly because of the intensity with which local teacher groups throw themselves into such campaign chores as doorbell ringing and telephone solicitation and partly because, as one Democratic Congressman put it, "they lend class to a campaign."

Both of the teacher organizations intend to step up the political fund-raising activities on a year-round basis, both insist they would not be hurt, if Federal and state laws were changed to cut off all campaign spending by special-interest groups.

"Money is the least significant aspect of what we do," says Mr. Shanker [President of the American

Federation of Teachers]. * * * "Our real value is in the people we put into campaigns. In New York State alone we had over 4,000 volunteers in 1974."

Terry Herndon, the NEA's executive secretary, feels much the same way. "I am something of a fundamentalist," he says. "Our greatest resource is people. The more the Government shuts down on money in campaigns, the better shot we'll have at electing our candidates." [43]

Also in 1975, the *Washington Star* printed an interview with NEA President Ryor, in which the following colloquy appeared:¹²

Q: How about the entry of NEA * * * directly into politics—contributions, endorsing presidential candidates, trying to get teacher delegates to party conventions? What do you see as the end result of that?

A: I think it's the beginning of real power among teachers. I think it reflects their * * * understanding of the fact that everything they do in their life is affected by a political decision * * *.

A year earlier, MEA President Mondale, referring to an article in the *Minneapolis Tribune* that had identified the MEA as "a commanding force in precinct caucuses", agreed that the MEA "organized for the caucuses and we produced". [44] And in 1977, NEA President Ryor wrote of media reports describing the organization's "push to get pedagogues into partisan politics" and its "historic leap into Presidential politics"—and concurred in their assertion that "the powerful National Educational Association * * * will make its voice heard". [33]¹³

¹² "NEA President on the Role of the Teacher", *Washington Star*, 24 Jul. 1975, at A-9.

¹³ Apparently the UTP itself provides information for much of this media coverage. [45]

In 1976, on National Public Radio's "Options in Education", NEA Executive Director Herndon answered questions about the UTP's political involvement:

[INTERVIEWER]: You're saying that the public is, in fact, influenced by teachers endorsing a certain candidate.

HERNDON: I believe it. A substantial portion of the public will be. More importantly than that, perhaps, is that we have an organized group of very capable people who are well educated in virtually every community in the United States. And that represents a formidable group of campaign workers for any candidate. [46, p. 17]

Last year, on NBC Television's "Meet the Press", NEA President Ryor explained how the UTP's participation in the 1978 elections would differ from its earlier electoral activities. "It is going to be a different participation," he said,

only because it is going to be larger. * * * We have for some time been involved in the House and Senate races.

We have something in the neighborhood of half of the —435 seats up this fall and something in the neighborhood of 50 of the Senate seats as well.

We are going to have teachers involved in every one of those congressional districts and teacher leaders as well, not only in terms of canvassing the parents of students and the community leaders, but also in making certain that the problems of the schools are placed in front of those congressmen and those senators and that we get specific responses * * *.

[INTERVIEWER]: Will you be actively working for some congressional candidates and opposing others?

MR. RYOR: We will, indeed. [47, p. 5]

Later in the same program, the questioning touched directly on the political character of the UTP:

[INTERVIEWER]: * * * As teachers increasingly get into politics as the NEA is doing, * * * what is to prevent citizens, taxpayers, parents from beginning to view teachers differently, not so much as educators, but as people constituting another pressure group out to use power for their own interests, and a pressure group that possibly might have to be resisted by politicians and the voters?

MR. RYOR: There is nothing to prevent that, and in all likelihood it will be that teachers are viewed differently once they become active in politics * * *. But that is the nature of the political involvement aspect of our program as well. It is risk * * * a risk I believe teachers are willing to take. [47, p. 9])

Most recently, the November 1978 edition of *Readers Digest* carried a lead story on "The NEA: A Washington Lobby Run Rampant". [48] "The drive for power, nationwide, by this huge and aggressive teachers union", the article summarizes, "provides a classic study of how special-interest politics can overwhelm the public interest." Based upon a thorough study of the UTP,¹⁴ the article recounts how

[a] succession of NEA presidents have proclaimed its aims:

"We are the biggest potential political striking force in this country," said Catharine Barrett in

¹⁴ An internal NEA memorandum describes the author of the article, E. H. Methvin, as "a persistent, sharp reporter * * * hard-hitting, big on the debate platform as well as in his 'exposes'"—and notes that *The Reader's Digest* research department asked "detailed questions about the organization of NEA, its UniServ program", and other matters. [49]

1972. "And we are determined to control the direction of education."

"We must reorder congressional priorities by reordering Congress," Helen Wise told NEA political fundraisers in 1974. "We must defeat those who oppose our goals."

Promised current NEA President, John Royer, "We will become the foremost political power in the nation."

The article also succinctly describes how the UTP intervenes in the campaigns of candidates for election to public office.

Since 1972, NEA professionals have run an estimated 30,000 teachers through "political-action workshops" • • • . The union offers political candidates privileged access to these trained battalions. In every state, the NEA has set up political-action committees (PACs). At election time, screening committees quiz candidates, and once PAC endorses a candidate, its chairman uses the NEA "talent-inventory" files to provide campaign managers with volunteers for every imaginable task, from stuffing envelopes and manning telephone banks to chauffeuring voters to the polls. "We can elect friends of education and un-elect foes," boasts Ryor.

And the article identifies the UTP's "ultimate goal" in the blunt language of Executive Director Herndon:

To tap the legal, political and economic powers of the U. S. Congress. We want leaders and staff with sufficient clout that they may roam the halls of Congress and collect votes to re-order the priorities of the United States of America.

Material such as this from leading newspapers, magazines, and the electronic media is sufficiently notorious to

qualify for judicial notice. But again, the Court should not require plaintiffs to predicate their factual case upon reports in the public press, particularly in light of defendants' denial of plaintiffs' Request to Admit the mere existence of substantial press-coverage recognizing the UTP as a powerful force in electoral politics throughout the nation. [50]

B. PREVIOUS DECISIONS OF THE SUPREME COURT ON ISSUES RELATED TO THOSE PLAINTIFFS RAISE IN THIS CASE TEACH THAT, WITHOUT A COMPLETE FACTUAL RECORD, NEITHER THIS COURT AT TRIAL, NOR THE SUPREME COURT ON APPEAL, CAN PROPERLY ADDRESS PLAINTIFFS' CONSTITUTIONAL CLAIMS.

The need in this case to develop a factual record that documents with particularity the political activities of the UTP is not a matter of plaintiffs' desire alone—but, in addition, the course of action a series of Supreme-Court decisions on related issues unequivocally mandates. Moreover, the most recent of those decisions, *Abood v. Board of Education*,¹⁸ indicates that, given the complete record plaintiffs seek, the Court will sustain their constitutional arguments and hold the Minnesota PELRA unconstitutional as applied.

1. *This case will be the first to provide the Supreme Court with an opportunity to settle the fundamental First- and Fourteenth-Amendment questions surrounding "exclusive representation" in public employment.*

The Supreme Court has addressed the constitutionality of "exclusive representation" (majority-rule) in labor relations only in *Carter v. Carter Coal Co.*¹⁹ There, the Court

¹⁸ 431 U.S. 209 (1977).

¹⁹ 298 U.S. 238 (1936).

held that the majority-rule provision of the Bituminous Coal Conservation Act violated the Due Process Clause of the Fifth Amendment. The effect of the provision with respect to wages and hours, the Court held,

is to subject the dissentient minority * * * to the will of the stated majority * * *.

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. * * * [I]n the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.¹⁷

The majority-rule provision, added Chief Justice Hughes, concurring,

permits a group of * * * employees, according to their own views of expediency, to make rules as to hours and wages for other * * * employees who were not parties to the agreement. Such a provision, apart from the mere question of the delegation of legislative power, is not in accord with the requirements of due process of law * * *.¹⁸

Immediately thereafter, when the constitutionality of the National Labor Relations Act was first in issue, the Labor Board selected its test cases so as "intentionally [to]

¹⁷ *Id.* at 311.

¹⁸ *Id.* at 318.

avoi[d] presenting the Court with the 'touchy' and * * * doubtful questio[n]" of the constitutionality of majority-rule.¹⁹ Thus, when in *Jones & Laughlin* a private employer challenged the act on various constitutional theories, the Court avoided the issue of exclusive representation by construing the statute as "not prevent[ing] the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine' ".²⁰ Similarly, in a contemporaneous challenge to the constitutionality of the Railway Labor Act in *Virginian Railway*, the Court held that exclusive representation under that statute did not preclude individual contracts between the employer and dissenting employees.²¹ And, at about the same time, the *Steele* decision also failed to pass on the constitutionality of majority-rule. For there, the Court created the duty of fair representation, precisely to avoid serious constitutional questions of due process and equal protection surrounding exclusivity.²²

¹⁹ 1 J. Gross, *The Making of the National Labor Relations Board* 187 (1974).

²⁰ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) (footnote omitted).

²¹ *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515, 548-49 (1937). Only seven years later, in two cases raising issues of statutory construction alone, did the Court re-interpret the National Labor Relations and Railway Labor Acts so as to preclude individual contracts in most instances. *J. I. Case Co. v. NLRB*, 321 U.S. 332, 334-39 (1944) (National Labor Relations Act); *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 346-47 (1944) (Railway Labor Act). Neither of these decisions, however, reconsidered the constitutional questions raised in *Jones & Laughlin* or *Virginian Ry.*, although the statutory constructions adopted in the latter cases formed the necessary predicates for their constitutional holdings. See Comment, "The Mechanics of Collective Bargaining", 53 *Harv. L. Rev.* 754, 789-91 (1940).

²² *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 198 (1944).

Subsequent to *Steele*, no other case arose that implicated the unconstitutionality of exclusive representation until *Madison School District*, which recently declared that the device could not pre-empt the First-Amendment privilege of a dissenting public-school teacher to address his employer at a public meeting on a matter then the subject of collective bargaining between the teacher's exclusive representative and employer.²³ Certainly the question did not arise—and could not legally have arisen—in *Abood*.²⁴ In that case, no challenge to exclusive representation appeared in the complaint.²⁵ Neither did the lower court purport to rule on the issue.²⁶ Nor did any of the parties present such a question to the Supreme Court.²⁷ Indeed, the parties explicitly reserved argument on the constitutional merits of majority-rule, recognizing that their “appeal . . . [did] not raise the question”.²⁸ Moreover, the *Abood* plurality opin-

²³ *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976), discussed in Vieira, “Exclusive Representation versus Freedom of Petition for Nonunion Public Employees—A Study in Irreconcilable Constitutional Conflict”, 1977 *Detroit College of Law Review* 499, 560-99. Plaintiffs rely strongly on *Madison School District* in support of their contention that the “meet-and-confer” provisions of the Minnesota PELRA are unconstitutional on their face and as applied. Minn. Stat. §§ 179.63, subd. 16; 179.65, subd. 1; 179.66, subd. 7.

²⁴ *E.g.*, *Bradstreet v. Potter*, 41 U.S. (16 Pet.) 317 (1842) (Court will not render opinion on “ulterior points” in case, although parties desire it, where points not properly raised).

²⁵ Appendix to Brief for Appellants at 6-15, 39-52.

²⁶ *Id.* at 94-104.

²⁷ Jurisdictional Statement at 6; Brief for Appellants at 4; Brief for Appellees at x.

²⁸ Brief for Appellants at 148. To like effect are the following disclaimers: “We must and shall refrain from addressing the merits of [the exclusivity] issue, secure in the knowledge that they will wend their tortuous way to this Court, sooner or later.” *Id.*

ion itself defined the question for decision as the limited one of "whether an agency shop provision in a collective-bargaining agreement covering government employees is, as such, constitutionally valid".²⁹ And the record contained no facts with respect to exclusive representation (or anything else), which prompted the plurality to reiterate that "[a]ll we decide is that the general allegations in the complaint, if proven, establish a cause of action under the First and Fourteenth Amendments" with respect to the agency shop.³⁰

In sum, this case will likely be the first to provide the Supreme Court with an opportunity to decide whether, consistently with the First and Fourteenth Amendments, a State may require public-school teachers, as a condition of employment, to accept what the record proves is a political-action organization as their "spokesman" for purposes of negotiating the terms and conditions of their own employment. That is, the instant case will be the first to present this highly important issue if this Court permits plaintiffs to construct the detailed factual record necessary for proper adjudication of the constitutional questions they raise in their Amended Complaint.

"We repeat: Our concern here is *not* to attack the principle of exclusive representation as such." *Id.* at 149. "[T]he states are free to adopt the federal mode of majority rule and exclusive representation (which appellants do not challenge) * * *." Brief for Appellees at 34. "In our main brief, we recognized that the exclusive-representation device is not immediately in issue in this appeal." Reply Brief for Appellants at 39.

²⁹ 431 U.S. at 217 (opinion of Stewart, J.). As the Eighth Circuit has ruled here, the issue of exclusive representation is constitutionally distinct from that of the agency shop. *Knight v. Alsop*, 535 F.2d 466, 470-71 (8th Cir. 1976).

³⁰ 431 U.S. at 237.

2. *The Supreme Court's decisions in Hanson, Street, and Aboud all indicate the necessity for a detailed factual record in this case.*

That the development of a full factual record is the *sine qua non* to proper adjudication of the constitutional issues raised here is the lesson of over twenty years of litigation on related issues.

In *Hanson*, dissenting employees challenged a provision of the Railway Labor Act authorizing compulsory union-membership agreements, on the grounds that such agreements violated the First Amendment. "Wide-ranged problems", noted Justice Douglas for the Court,

are tendered under the First Amendment. It is argued that the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights.

• • • • •

It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record.²¹

Later, in *Street*, the Court used the technique of statutory construction to avoid another First-Amendment challenge to the same section of the Railway Labor Act. Dissenting, Justice Black predicted that

[t]he constitutional question raised • • • in this case • • • is bound to come back here soon with a record so meticulously perfect that the Court cannot escape deciding it.²²

²¹ *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 236, 238 (1956) (footnote omitted).

²² *International Ass'n of Machinists v. Street*, 367 U.S. 740, 785 (1967). One of plaintiffs' goals is to fulfill Justice Black's prophecy.

And most recently, in *Abood*, a case involving the constitutionality of a compulsory-unionism provision in the Michigan Public Employment Relations Act, the Court heard the appeal with "no evidentiary record of any kind."³³

In *Abood* as in *Hanson*, with respect to the most important constitutional issues there were no facts as to what collective bargaining through exclusive representation entails; no facts as to how an exclusive representative expends its financial income; and no facts as to the nature or character of the exclusive representative as an organization, its institutional purposes, or its substantial or essential activities. Of particular interest in this regard is Justice Stevens' comment that

[o]ur knowledge of the facts is limited to a bald assertion that the Union engages "in a number and variety of activities which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve." * * * What, if anything, will be proved at trial is a matter for conjecture."

Justice Stevens' concern for what "will be proved at trial" is a matter, not only of interest, but also of crucial practical importance. For, no less than twenty years after *Hanson* and ten years after *Street*, the basic questions those opinions failed to settle remain the subjects of protracted and expensive litigation in a United States District Court.³⁴ And, almost two years after *Abood* decided that dissenting employees have a First-and Fourteenth-Amendment privilege to refrain from supporting the political ac-

³³ *Abood v. Board of Educ.*, 431 U.S. 209, 236-37 (1977) (opinion of Stewart, J.).

³⁴ *Id.* at 244 n. (separate opinion).

³⁵ *Ellis/Fails v. Railway Clerks*, 91 L.R.R.M. 2339 (S.D. Cal. 1976), *modified*, 93 L.R.R.M. 2976 (S.D. Cal. 1976).

tivism of an exclusive representative, the case continues, on remand, in the state courts of Michigan.³⁶

The history of these cases teaches the improvidence, on the part of both litigants and trial courts, of not developing complete factual records before requesting relief and rendering decisions that lead to review by the Supreme Court. No lesson could be more important here, because of the nature of plaintiffs' constitutional claims, and the proofs that plaintiffs have already adduced in support of those claims. For plaintiffs have raised and documented the very First-Amendment issue that *Abood* indicates the Supreme Court will sustain by an overwhelming majority.

3. *The several opinions of the Justices in Abood imply that, given a factual record establishing the essentially political character of the United Teaching Profession, the Court will overwhelmingly support plaintiffs' theory of the case.*

The several opinions in *Abood* all show that, if the Supreme Court had before it a record documenting the assertion that a union or other group acting as the exclusive representative of dissenting public-school teachers is a political-action organization, the Court would hold that the statute authorizing the organization to act as such a representative is unconstitutional as applied under *Elrod v. Burns*.³⁷

In their opinion, Justices Stewart, White, Brennan, and Marshall drew an implied distinction between an organization acting as an exclusive representative and a political party. Indeed, had they not drawn such a distinction, it would have been inconsistent for them to hold, on the one

³⁶ See the report of the related case, *Ball v. City of Detroit*, 84 Mich. App. 383 (1978).

³⁷ 427 U.S. 347 (1976).

hand, that dissenting public-school teachers may constitutionally be required as a condition of employment to finance the "collective-bargaining" activities of such a representative, and, on the other hand, to re-affirm the decision in *Elrod* that dissenting public employees may not constitutionally be required as a condition of employment

to pledge their political allegiance to [a political party], work for the election of other candidates of [a political party], contribute a portion of their wages to [a political party], or obtain the sponsorship of a member of [a political party].³⁸

In *Abood*, this abstract distinction between an exclusive representative and a political party was arguably sound, for two reasons. First, there was no factual record that established substantial or essential involvement in political activism on the part of the defendant employee-organization. Second, one can imagine an organization of public-school teachers—such as a traditional faculty senate—that engages in no political activity (other than public-sector collective bargaining itself), and that therefore could not be likened in any realistic sense to a political party or political-action organization.³⁹ However, where (as here) plaintiffs did present a record proving that a defendant exclusive representative was not a politically neutral faculty

³⁸ *Elrod*, 427 U.S. at 355. Justice Stewart referred to *Elrod* as a leading freedom-of-association case under the First Amendment, and explicitly re-affirmed its holding quoted in the text. *Abood*, 431 U.S. at 233-24.

³⁹ Whether a traditional faculty senate might be disqualified from acting as an exclusive representative on grounds other than its political activism is not an issue in this case. Indeed, plaintiffs have never challenged the privilege of the Community College Board or its agents to recognize a true faculty senate as the representative of all the teachers in the system. Plaintiffs' complaint is that the UTP is, for all purposes of constitutional law, essentially a special-interest political party, or political pressure-group, not an organization akin to a faculty senate.

senate, but instead a militant, state-and nation-wide political-action organization, the distinction adopted by Justice Stewart and his brethren would be inapplicable. And, in such a context, the rule of *Elrod* would disqualify such an organization from purporting to act as the "spokesman" of dissenting teachers just as *Elrod* disqualified a traditional political party from demanding that dissenting public employees obtain its "sponsorship" as a condition of their employment. Therefore, if plaintiffs present the Supreme Court with facts establishing the political character of the UTP, at least four Justices—Stewart, White, Brennan, and Marshall—will likely rule the Minnesota PELRA unconstitutional as applied.

On the basis of their opinion in *Abood*, moreover, Justices Powell and Blackmun, and Chief Justice Burger, will also concur. In his opinion for the three, Justice Powell asked "whether a union in the public sector is . . . distinguishable from a political candidate or committee", and answered that, in his view, no principled distinction exists.

The ultimate objective of a union in the public sector, like that of a political party, is to influence public decisionmaking in accordance with the views and perceived interests of its membership. . . . [The] objective [of a teachers' union] is to bring school board policy and decisions into harmony with its own views . . . to obtain favorable decisions—and to place persons in positions of power who will be receptive to the union's viewpoint. In these respects, the public sector union is indistinguishable from the traditional political party in this country.⁴⁰

Justice Powell's judicial notice of the political character of public-sector unions *in general* may be an exaggeration—although judicially noticeable reports in the public press and media might be sufficient to hold that *the UTP, as a*

⁴⁰ 431 U.S. at 256-57 (footnote omitted).

specific case, is indistinguishable from a traditional political party. In any event, whatever the merits of Justice Powell's general observation, he, Justice Blackmun, and Chief Justice Burger will evidently sustain plaintiffs' constitutional claims if presented with a factual record specifically documenting the essentially political nature of the UTP. Therefore, given such a record, at least seven Justices—Stewart, White, Brennan, Marshall, Powell, Blackmun, and Burger—will likely rule the Minnesota PELRA unconstitutional as applied.

Justice Stevens will concur in this result as well, since he expressed concern in *Abood* that any remedy fashioned in that case should avoid imposing political conformity on dissenting employees "even temporarily".⁴¹ And requiring a dissenting public-school teacher to accept what amounts to a political party as his "spokesman" for the purpose of negotiating long-term employment agreements binding on him is hardly a "temporary" violation of his First- and Fourteenth-Amendment rights. Therefore, at least eight Justices will rule for plaintiffs, given an adequate factual record.

Which leaves only Justice Rehnquist. In *Abood*, of course, he agreed with Justice Powell that no principled distinction exists between an exclusive representative and a traditional political party; but he refused to follow the holding of *Elrod* that a State may not condition public employment upon "sponsorship" by such a party.⁴² Presuming, however, that Justice Rehnquist can be persuaded of the binding nature of precedent, he may yet support plaintiffs' constitutional arguments.⁴³ In any event, he is a lone dissenter.

⁴¹ *Id.* at 244 (separate opinion).

⁴² *Id.* at 242-44 (separate opinion).

⁴³ *E.g.*, *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976) ("institutional duty [of each Justice] is to follow until changed the law as it now is, not as some Members of the Court might wish it to be").

Abood, then, provides a compelling reason for enabling plaintiffs to adduce the most complete and carefully documented factual record of which they are capable: namely, that with such a record in hand, their victory in this litigation is assured. Indeed, this Court need only consider the contrary proposition to realize the overwhelming force of plaintiffs' argument. If a traditional political party believed that exclusive representation of public employees was an expedient means to promote its fortunes; and if it then established "collective-bargaining" units or divisions for the purpose of forcing itself as "spokesman" on dissenting employees as a condition of the latter's employment; and if those employees then asserted *Elrod* as a constitutional bar to compulsory sponsorship" by the party—if all this were the case, could anyone expect the Supreme Court to rule that, notwithstanding *Elrod* and the First and Fourteenth Amendments, the party might constitutionally impose itself upon dissenters anyway, for any reason? The question answers itself.

C. TO THE EXTENT A COMPLETE FACTUAL RECORD HAS NOT BEEN ADDUCED IN THIS CASE, DEFENDANTS' OBSTINANT AND IMPROPER CONDUCT IS TO BLAME.

The diligence with which plaintiffs have pursued discovery in this case reflects their confidence in its ultimate outcome. Since Fall, 1976, plaintiffs have amassed facts showing that, just as does a traditional political party, the UTP (i) endorses candidates for election to public office at the local, state, and national levels; (ii) solicits and collects monies for contribution to the campaigns of such candidates, to political parties, and to other political organizations, movements, and causes; (iii) attempts to maximize its influence at party conventions, and on party governing bodies, with respect to party rules, platforms, and nominees; and (iv) encourages, solicits, enlists, mobilizes, organizes, trains, supervises, and assists UTP officials, staff-personnel, and members to participate in the campaigns of

candidates for election to public office throughout the country. These facts, however, make up only a part of the record that plaintiffs are entitled to and can adduce.

To be sure, discovery has proceeded in this case for some months—not, however, because of plaintiffs' lethargy, but rather because of their willingness to accede to numerous requests for extensions of time in which to answer interrogatories or requests to admit, to produce documents, or to make witnesses available for depositions. [A-1] “ And if, at this point, the record is not yet sufficiently detailed to permit this Court's consideration of the constitutional issues the parties raise, it is not through plaintiffs' laxity, but rather because defendants throughout the course of discovery have interposed one improper obstacle after another to the development of a complete record.

As detailed in Part II., *infra* pp. 83-143, defendants have refused to respond in good faith to plaintiffs' Requests to Admit or to accept various stipulations of fact plaintiffs have proposed. As described in Part III., *infra* pp. 143-92, defendants have withheld from production numerous documents plaintiffs have requested, without even indicating what these documents contain or the reason for—indeed, even the fact of—their non-production. And as developed in Part IV., *infra* pp. 192-323, the testimony of several of defendants' staff-personnel whom plaintiffs have called as witnesses has been neither candid nor complete. In addition, because of defendants' continual refusal to acknowledge that UTP staff-personnel do participate on a regular basis in activities related to the campaigns of candidates for election to public office (such as get-out-the-vote drives, telephone-banks, and so on), plaintiffs have incurred extraordinary expenses in hiring private detectives for the purpose of tracking down and uncovering those very UTP staff-

“ The designations [A-1], [A-2], . . . , [A-n] refer to Affidavits prepared in support of this Motion that appear in the Appendix of Affidavits.

personnel performing precisely the campaign-activities in which plaintiffs have consistently asserted, and defendants have consistently denied, they regularly engage.⁴⁵

Unfortunately for both plaintiffs and the Court, a complete dossier of defendants' misconduct became available only with and subsequent to the most recent series of depositions—that is, after the hearing of 13 October 1978 at which the Court ordered that plaintiffs complete discovery herein by 31 December 1978. At that time, plaintiffs were prepared to bring to the Court's attention, if absolutely necessary, various instances of defendants' malfeasance in discovery. However, plaintiffs were also aware that depositions of some of the UTP's most important staff-personnel at the national level were scheduled or anticipated, and that, concomitant with these depositions, further document-production might also be forthcoming. Plaintiffs chose, therefore, to postpone any revelations to this Court, in the hope that defendants might at last cooperate in the development of the record in this case.⁴⁶ That hope, however, the events of the last three months have shattered.

Under normal circumstances, further discovery by plaintiffs would be within the Court's discretion.⁴⁷ Under the circumstances of this case, however, involving proven abuses by defendants that seriously prejudice plaintiffs' rights, the interests of justice compel the exercise of that discretion in their favor.⁴⁸ Moreover, this Memorandum documents the complexity of the factual issues in this case,

⁴⁵ Part IV.B.2., *infra* pp. 259-97.

⁴⁶ Therefore, the instant Motion is unquestionably timely. *Riley v. United Air Lines, Inc.*, 32 F.R.D. 230, 232-33 (S.D.N.Y. 1962); *In re Wheat Farmers Antitrust Class Action*, 440 F. Supp. 1022, 1025 n.1 (D.D.C. 1977).

⁴⁷ *E.g.*, *Fowler v. Wirtz*, 34 F.R.D. 20, 23-24 (S.D. Fla. 1963).

⁴⁸ *Greyhound Lines, Inc. v. Miller*, 402 F.2d 134, 144-45 (8th Cir. 1968).

and the substantial amount of probing that will be required to ferret out the truth. This Court may—indeed, should—supervise and police its docket to assure that cases are promptly and properly tried. And a set rule limiting the extent of pre-trial discovery may be appropriate for routine cases. But no rule can properly require that completeness in exposure of the issues be sacrificed to speed in reaching a result, perhaps erroneous, in the ultimate trial on the merits; and no inflexible rule can deal properly with exceptional cases. Unnecessary and unreasonable delay should be avoided; but adequate time must also be provided for discovery, according to the nature of the particular circumstances. Here, what was a reasonable time-allowance on 13 October 1978, according to the presumptions the Court then entertained, is no longer so. The very discovery the Court permitted in its Order of that date has disclosed as much. And therefore, this Court should reappraise the whole situation in light of the facts that plaintiffs disclose in this Memorandum.”

II. Defendants Denied Substantial Numbers of Plaintiffs' Requests to Admit Either in Bad Faith or in Willful Disregard of Their Duty to Investigate the Factual Basis for Any Denial; and They Have Made No Greater Effort to Reach Stipulations With Plaintiffs in Regard to Defendants' Political Activities.

At the hearing of 13 October 1978, this Court repeatedly enjoined the parties to work towards a stipulation of undisputed facts in this case. Both before and after that hearing, plaintiffs have expended significant effort to provide a set of such facts, through both requests to admit and suggested stipulations presented to defendants. Plaintiffs' efforts, however, have failed—because of defendants' bad faith.

⁴⁰ Freehill v. Honorable Oren R. Lewis, 355 F.2d 46, 48-49 (4th Cir. 1966).

A. DEFENDANTS' COUNSEL, ADMITTEDLY IGNORANT OF THE BASIC STRUCTURE AND OPERATIONS OF THE UNITED TEACHING PROFESSION, ATTESTED DEFENDANTS' DENIALS OF PLAINTIFFS' REQUESTS TO ADMIT; AND THE FACTS EXPOSE A SUBSTANTIAL NUMBER OF THOSE DENIALS AS GROUNDLESS.

Plaintiffs did everything within their power to simplify and make palatable to defendants the task of responding to plaintiffs' Requests to Admit. One or more of plaintiffs' counsel conferred frequently with defendants' counsel concerning the language of the Requests, so as to minimize semantic misunderstandings. Plaintiffs' counsel supplied defendants' counsel with a list of representative facts, drawn from the record, that substantiated the Requests. And, on two occasions, both of plaintiffs' counsel met with defendants' counsel to exchange views on the Requests, to hear and suggest modifications, and generally to attempt to reach accord.⁵⁰ Neither Federal Rule of Civil Procedure 36 nor Local Rule 5 required these actions on the part of plaintiffs' counsel.

Federal Rule 36 contemplates that defendants requested to make admissions will expend reasonable effort to determine the factual basis for any denial, rather than denying a request on the off-chance that plaintiffs will be unable to prove the denial untrue. If such a request is legally objectionable, defendants should object to, not deny, the request.⁵¹ And if they cannot object, they should seek out all information reasonably available to them that is relevant to the request and their answer.⁵² Defendants may not deny requests simply because they, or their counsel, have no in-

⁵⁰ The meetings were held on the 2d and 3d of February 1978, and covered a substantial number of plaintiffs' Requests.

⁵¹ *Dulansky v. Iowa-Illinois Gas & Elec. Co.*, 92 F. Supp. 118, 123 (S.D. Iowa 1950).

⁵² 4A J. Moore, *Federal Practice* para. 36.04[6], at 36-38.

dependent knowledge of the facts plaintiffs ask them to admit, if that information is within the reasonable capability of defendants to obtain.⁵³ Indeed, in some instances, it is not unreasonable to require defendants to conduct independent research to verify the accuracy of the requested admissions plaintiffs present to them.⁵⁴ Especially in a case such as this, involving an organization as large and complex as the UTP, involving activities of the organization that have occurred across the United States over the last eight years, and involving sources of information to which the organization and its agents alone are privy, a reasonable effort on defendants' part must entail inquiry made of those individuals or records likely to know or to contain dispositive information. This, however, is not the course defendants followed.

1. *Defendants relied upon counsel, admittedly ignorant of the nature and extent of United-Teaching-Profession activities, and not upon knowledgeable officials or staff-personnel, to frame their denials of plaintiffs' Requests to Admit.*

Although defendants are aware that plaintiffs' claims focus upon the UTP's political activism, and particularly its involvement in the campaigns of candidates for public office, defendants never called upon Stanley McFarland, Director of the NEA-GRD, to respond to, or to consult on, plaintiffs' Requests to Admit. [51] Although defendants are aware that plaintiffs' claims focus upon the role that UniServ plays in the UTP's program of political activism, defendants never called upon Gary Watts, Director of several NEA Departments including UniServ, to respond to, or to consult on, plaintiffs' Requests to Admit. [52] And

⁵³ *Ranger Ins. Co. v. Culberson*, 49 F.R.D. 181, 193 (N.D. Ga. 1969).

⁵⁴ *Lumpkin v. Meskill*, 64 F.R.D. 673, 675-79 (D. Conn. 1974).

although defendants are aware that plaintiffs' search for facts has concentrated on UTP publications, defendants called upon and consulted with Susan Lowell, Director of the NEA Communications Department, in only the most cursory manner. [53]

Moreover, the individual who signed defendants' Answers to plaintiffs' Requests to Admit (and thereby assumed primary responsibility for those Answers) was not Mr. McFarland, Dr. Watts, Mrs. Lowell, or any other official or staff-person of any unit or level of the UTP who might be knowledgeable as to that organization's structure, activities, and goals. Quite the contrary: the signator was Mr. Keith Goodwin, Esq., one of several counsel for defendants whom the Lowell deposition exposes as peculiarly ignorant of the UTP's workings:

Q. [by Dr. Vieira, for plaintiffs] * * * you say you have prepared some kind of time line for them and you have developed communications-related activities to sell the programs that have been identified by the directors of those goal areas as priority programs; is that correct?

A. [Mrs. Lowell] Yes.

* * *

MR. GOODWIN [for defendants]: You used the term "goal areas." And I guess I am unfamiliar with exactly what that means. I would like to have an understanding we are talking about the same goal areas. Is that in the document?

MR. VIEIRA: No. That is a technical term used around the NEA, I believe, to refer to activities such as significant legislative support for public education, one of the goals of NEA.

That is Mr. McFarland's area.

Teacher Rights are a couple of goals. Those are Mr. Cox's goal area.

Instruction is Mr. Sullivan's goal area. It is the area of the activity under the directors, so-called, of the NEA.

MR. GOODWIN: Are you talking about her [Mrs. Lowell's] goal area in Communications, whatever that might be?

MR. VIEIRA: No.

THE WITNESS: Technically, Communications is a support area since we serve all the goals. But that is the difference. [54]

In this case, for defendants' counsel to be (as Mr. Goodwin admitted) "unfamiliar with exactly what [the term 'goal area'] means" is equivalent to a purported American political scientist being "unfamiliar" with the terms "executive", "legislative", and "judicial branches" of government. For the goal areas of the NEA are precisely the major organizational branches or departments in and around which the UTP structures its entire national-level program. [55]

Despite his ignorance of the fundamental facts in this case, Mr. Goodwin admits to authorship of, as well as attesting to, defendants' denials of plaintiffs' Requests to Admit. Again, from the Lowell deposition:

Q. . . .

MR. GOODWIN: Well, you [referring to Dr. Vieira] have got about a four-part question. Talking they can be this way, that way, and thus way.

And you are misleading the witness. She cannot answer a question with four parts. I will indicate on the record, as I indicated in the request for admissions, that we will stipulate that the NEA endorsed Carter-Mondale, and will stipulate that they encouraged their members to support Carter-Mondale.

MR. VIEIRA: Well, I know.

MR. GOODWIN: I don't know what you are trying to do with this line of questioning.

MR. VIEIRA: Encourage doesn't mean anything to me.
• • • [56] "

To be sure, Mr. Goodwin also claims that defendants' "denials are based on the facts". [57] But the record belies this assertion.

2. *A cursory examination of the record exposes a substantial number of defendants' denials of plaintiffs' Requests to Admit as incredible on their face.*

Comparison of a representative number of plaintiffs' Requests to Admit that defendants denied to the record demonstrates that defendants put forward their denials either in bad faith or in reckless disregard of their duty under Federal Rule 36 to investigate the factual basis for

"Mr. Goodwin's offer of a "stipulation" is revealing. In several places in their Requests to Admit, plaintiffs referred to actions of the UTP designed to "encourage, solicit, mobilize, organize, train, or assist" UTP members to do certain things, particularly to serve as campaign-workers on behalf of candidates for election to public office. Although plaintiffs can adduce facts demonstrating that the verbs "solicit", "mobilize", "organize", "train", and "assist" are apt, defendants have never indicated any willingness to admit that the UTP does all or any of these things—or, indeed, does anything other than "encourage" its members (whatever that may mean to defendants). Thus, almost invariably, when the chain "encourage, solicit, . . . , assist" appeared in one of plaintiffs' Requests, defendants admitted the "encouragement", and denied everything else. Apparently, as the passage from the Lowell deposition cited in the text implies, Mr. Goodwin treated plaintiffs' Requests as an offer of stipulation: that is, he felt free to respond to those Requests with that to which he would stipulate, whatever the facts might be. Since he was willing to stipulate to "encouragement", he admitted that the UTP "encourages" its members to perform certain activities. But since he was unwilling to stipulate to anything beyond "encouragement", he blithely denied the rest.

their answers. This is particularly apparent from defendants' refusal to answer any of plaintiffs' Interrogatories accompanying the Requests to Admit, which Interrogatories in general called upon defendants, if they denied some Request in its entirety, to "state * * * each and every fact which supports your denial"; and, if they denied some Request only in part, to "state the parts or phrases which you admit and those parts or phrases you deny". Defendants' approach to plaintiffs' Requests, in short, was simply to deny them, without any explanation as to contrary facts that supported their denials, or even any identification of those parts or phrases in the Requests that they considered untrue. The following are illustrative:

Example A

REQUEST No. 11. NEA-PAC is a committee, controlled by NEA, the major purpose of which is to assist the partisan-political campaigns of candidates for election to public office at the national level by making financial contributions to, and/or endorsements of, the candidates' campaigns.

ANSWER No. 11. Admit that NEA-PAC is a committee, the major purpose of which is to provide financial assistance to the campaigns of candidates for election to public office at the national level by making financial contributions. Except as hereinabove admitted, request 11 is denied.

ANALYSIS. Defendants attempted to limit their admission of the NEA-PAC's activities to "financial contributions".⁵⁵

⁵⁵ This is in keeping with one of the favorite tactics of defendants' counsel: viz., the use of trick-words and -phrases, and definitions known only to themselves. For example, in the Lowell deposition:

Q. [by Mr. Fogarty, for plaintiffs] * * * These were election victories where you supported the candidates or endorsed the candidates?

A. [Mrs. Lowell] Well, through the PAC group, yes.

MR. GOODWIN [counsel for defendants]: So the record is

The NEA-PAC's own organic documents, however, describe its activities as including contributions, endorsement, and candidate-support:

- A. Support of candidates may be in the form of public and/or internal endorsements, financial assistance and campaign workers where available through constituent groups.
- B. Decisions on public endorsements shall be made only in consultation with candidates.
- C. Endorsements of a candidate may be made without financial assistance. [59]

Example B

REQUEST No. 29. One of the premisses on which the NEA organization operates is that political decisions shape the process of education in the public sector, because educational programs and funding are matters subject to the control of legislative, executive, agency, or other governmental officials at the local, state, and national levels.

ANSWER No. 29. Denied.

ANALYSIS. Plaintiffs have already referred the Court to numerous examples of statements in UTP literature echo-

clear, the use of "endorsement" is a term that is undefined. As you know PAC makes financial contributions to candidates. That is, the PAC endorsements.

If you choose to call it that, we would call it a financial contribution by NEA-PAC.

MR. LAJEUNESSE [counsel for plaintiffs]: NEA puts out letters of endorsement.

MR. GOODWIN: I have already made my statement. [58]

So, to Mr. Goodwin an "endorsement" is a "financial contribution". This is one way in which defendants' counsel have endeavored to make the record "clear" throughout the course of this case.

ing the organizational slogan "every educational decision is a political decision".⁵⁷

Example C

REQUEST No. 33. The process of collective bargaining on behalf of teachers in the public sector involves decisions concerned with, among other things, the size and allocation of the governmental budget, tax rates, the level and quality of public services, and the long-term obligations of the government.

ANSWER No. 33. Denied.

ANALYSIS. The chief spokesman of the UTP at the national level, NEA President John Ryor, testified to the truth of the above-quoted Request.

MR. VIEIRA [for plaintiffs]: Let's * * * ask the question whether Mr. Ryor agrees that the major decisions made at the bargaining table for the public employees involve questions including the size and allocation of the budget, tax rates, level of public services and the long term obligations of the government.

THE WITNESS [Mr. Ryor]: I do. [60]

Example D

REQUEST No. 35. With respect to its members and to those other teachers subject to its representation through schemes of exclusive representation such as exist in Minnesota under the Public Employment Labor Relations Act, the NEA organization is an advocate organization which claims to act as a spokesman in collective bargaining with school boards; lobbying to influence school boards; lobbying to influence legislative, executive, agency, or other governmental action at the state and national levels; and partisan-

⁵⁷ *Supra* pp. 50-62.

political activities such as the endorsement or financial support of candidates for election to public office at the local, state, or national levels.

ANSWER No. 35. Admit that the MCCFA, with the assistance of the MEA and NEA, represents, in collective bargaining, all teachers employed in the Minnesota Community College system. Except as hereinabove admitted, request 35 is denied.

ANALYSIS. Defendants refused to admit that the UTP claims to act as an "advocate" or "spokesman" for its members, and for non-member teachers such as plaintiffs, with respect to collective bargaining, lobbying, and partisan-political activities. The literature of the UTP, however, is full of statements to the effect that the UTP puts itself forward as a "spokesman" in one area or another—and, in particular, as the "teachers' voice in politics" or the "teachers' advocate in politics". [61] In addition, NEA Executive Director Terry Herndon so testified.

Q. [Dr. Vieira, for plaintiffs] So, NEA, when an active advocate organization, is acting as a spokesman for its members vis-a-vis the external world——

A. [Mr. Herndon] Yes.

Q. Including governmental officials, political processes?

A. Yes.

Q. Does NEA also act as an advocate association, or organization for those teachers who are not NEA members but who are subject to exclusive representation by NEA affiliates?

A. Many situations, yes.

.

Q. With respect to lobbying activities which are financed by agency shop fees, . . . would NEA be acting

as a spokesman or advocate for the agency shop employee [i.e., non-member teachers such as plaintiffs]?

A. Yes.

Q. Is NEA through its state and local affiliates certified as the exclusive bargaining representative, acting as an advocate or spokesman for agency shop employees when it attempts to influence the public in terms of political involvement with candidates' selection or election?

A. * * * to the extent that I as a spokesperson for NEA may be quoted in a public meeting of sorts, I believe the answer to that would be yes.

Q. NEA does in fact publicize its position on candidates or endorsements and selection?

A. Yes.

Q. To that extent, you would be acting as an advocate for the agency shop employees?

A. I believe the answer to that is yes. * * * [62]

Example E

REQUEST No. 36. One of the premisses on which the NEA organization operates is that it must exercise such power as it has in the political process, not under the banner of any particular established political party, but under the banner of "education" as the organization sees it.

ANSWER No. 36. Denied.

REQUEST No. 37. On p. 4 of section III, "Political Persuasion", of the NEA training manual *Speaking for Teachers* appears the following paragraph:

Allowing political partisanship to enter into your dialogue will surely prejudice the outcome of your efforts. Even if the legislator is of a different political per-

suasion or party, he may be very personable and very capable. In spite of such differences you may be able to discuss your bills with him and even get commitments if you do not allow party politics to enter the discussion. This kind of neutrality will also leave open opportunities for discussion on future bills and issues. Remember—your party is the “education party.”

ANSWER No. 37. Admitted.

ANALYSIS. Defendants' answers to these two Requests contradict one another, since Request No. 37 provides some of the evidence plaintiffs have for the statement in Request No. 36. Defendants' treatment of these two Requests is typical of their attitude throughout this case: namely, admit the bare fact that something was done or said by the UTP, but deny its obvious significance. Here, they denied that advice admittedly printed in a UTP training manual used in political-action workshops throughout the United States accurately reflects an operating premiss of the organization.

Defendants' admission of Request No. 37 is not the sole support for Request No. 36. As early as 1970, NEA President George Fischer told the NEA convention that

we in the organized teaching profession must first determine that we are no longer just Republicans or Democrats, but that we have only real overriding party—education. [63, at 9]

NEA Executive Director Herndon testified that he meant essentially the same thing as Fischer when he (Herndon) urged UTP members to “continue to be partisan on behalf of education”. [64] And NEA President Helen Wise voiced similar sentiments at the National Press Club, when she reported that the UTP was

ready to undertake massive state-by-state grass roots campaigns that will guarantee the victories we need in

the 1974 Congressional elections, not under party banners, but under the banner of education; not anti-anyone or any party, but pro-education. [11]

MEA Executive Director Gallop has also advised UTP members that "[i]t's not important that teachers endorse a Republican or a Democratic ticket. It IS important that they endorse the ticket that will provide the best for teachers and students—for education". [65] And IMPACE Chairman Fulton Klinkerfues has also spoken of "efforts on our part to keep either one of the two parties in the State of Minnesota from becoming 'the education party'" [66, p. 4]—because, of course, the position of "education party" the UTP desires to retain for itself.⁵⁵

Example F

REQUEST No. 40. Participation by the NEA organization in partisan-political campaigns of candidates for election to public office at the state and national levels is of major importance to the success of the organization's legislative program.

ANSWER No. 40. Denied.

ANALYSIS. UTP spokesmen have repeatedly emphasized that political action is vital to the organization's legislative goals. For example, in 1972, NEA President Catharine Barrett stated that

[p]olitical action is my top priority as NEA President. I believe strongly that collective political action by teachers and their education associations is the only way to get adequate consideration for education on the local, state, and national levels. Only through effective political action can we have an impact on the Congress on association legislative priorities * * *. [6]

⁵⁵ On the significance of the UTP characterizing itself as the "education party", see Vieira, *supra* note 3, 27 *DePaul L. Rev.* at 363-81.

In 1973, NEA President Helen Wise reported that

teachers have realized . . . that they are part of the most political of all professions . . . all the major decisions about our profession are made by politically elected . . . school boards, legislators and congressmen. And although we know that we can (and will if necessary) put teachers on the Capitol steps and in the halls of every state legislature until our voice is heard, we also know that we cannot translate that voice into legislation that recognizes education as the foremost human priority of America if we continue to elect men and women who ignore that priority.

Two million teachers are a political force to be reckoned with. [11]

In 1974, NEA President James Harris declared that

[e]ducation is in *the political arena*, and I intend to keep it there.

. . . .

The direction ahead is clear: NEA-PAC-endorsed legislators on all levels must hold a substantial majority before we can withstand veto power and thus achieve a major breakthrough in political action. [13]

In 1975, NEA Executive Director Herndon reminded the NEA Representative Assembly that

[n]early every speaker before this convention has spoken of our astounding political achievements. Two hundred ninety of 310 endorsed candidates have assumed office. But in 1976 it is important that we do even better because we have seen that even with these achievements, we have not had the capability to override Presidential vetoes of significant social and economic legislation.

So I say, in 1976 we must dedicate ourselves with full vigor to the matter of improving the Ninety-Fourth Congress, and perhaps even better, electing the type of President that makes it possible that we stop worrying about the matter of overriding vetoes. [67]

In 1976, NEA President John Ryor also referred to the UTP's "need to assure the election of another pro-education Congress and a President who will support our two top legislative priorities". [68] "Friends in Congress are not enough", Ryor said; "[w]e must have a team in the White House which is committed to making education a top national priority". [69] And in 1977, NEA Executive Director Herndon told delegates at the NEA Representative Assembly that the UTP

must mobilize to provide a 96th Congress which is not only cordial, but actively committed to these programs. In 1976 we endorsed and assisted 271 winners. This a majority of the House of Representatives. Obviously, if we do not see considerable progress on our agenda, then we made some mistakes and it would be unthinkable to endorse the same majority for reelection. We need to be more aggressive but also more discriminating. . . . [W]e are equal to the task if we can organize and mobilize two million teachers to carry the fight into . . . every political campaign [70] "

Most recently, NEA President Ryor testified to the connexion between partisan politics and UTP lobbying efforts.

Q. [by Dr. Vieira, for plaintiffs] . . . Now is it your view . . . that there's a direct connection between the

"Revealingly, Mr. Herndon does not shrink from using the verbs "organize" and "mobilize" when referring to UTP activity and intentions relating to political campaigns. Contrast the denial of defendants' counsel, *supra* note 55.

success of NEA lobbying efforts on the one hand and NEA political activity in terms of supporting candidates at the Congressional and Presidential level?

A. [Mr. Ryor] Yes.

Q. * * * It's correct to say that NEA views activity in the area of electing candidates as useful or perhaps even necessary to achieve lobbying goals in Congress?

A. That's true.

Q. * * * So that political influence through the electoral process over the legislative branch of government * * * is necessary to the success of NEA's legislative program?

A. Yes. [71]

Example G

REQUEST No. 41. The success of the NEA organization's legislative program requires that the NEA and its state and local affiliates exert the maximum possible political influence over the legislative, executive, and judicial branches of the state and federal governments: namely, in so far as it is possible, directly controlling the composition of State legislatures and Congress, and the identity of state governors and the President of the United States, through intervention and participation in partisan-political campaigns of candidates for election to public office; and indirectly controlling the composition of the state and federal courts through the exercise of influence or control over executive appointments and legislative confirmations.

ANSWER No. 41. Denied.

ANALYSIS. NEA President John Ryor testified that the success of the UTP's legislative program at the national level depends upon the organization's exerting political influence on all three branches of the federal government.

Q. [by Dr. Vieira, for plaintiffs] * * * It's correct to say that NEA views activity in the area of electing candidates as useful or perhaps even necessary to achieve lobbying goals in Congress?

A. [Mr. Ryor] That's true.

Q. Because (a), Congress passes legislation, and (b), the President either signs or vetoes it. So that political influence through the electoral process over the legislative branch of government and the executive branch of government is necessary to the success of NEA's legislative program?

A. Yes.

Q. * * * is it also true from NEA's point of view that control to some extent through the political process over the judicial branch of government is necessary to the success of NEA's legislative program?

A. Well certainly the interpretations of Judges in Courts have an influence on what the legislation means and says, and whether it's Constitutional. The extent that these decisions alter, change, reject national Congressional legislation, I suspect it has some as it does with everything.

* * *

Q. So NEA * * * saw the election of a candidate favorable to the NEA position for President of the United States to be useful, not only from the point of view of the question of vetoes of congressional legislation, but also from the point of view of making Judicial appointments to the Supreme Court that would be advantageous to interpretations of the Constitution or other laws?

A. I think history would bear that observation out. I don't think it's any new revelation.

Q. . . . that was . . . one of the goals that NEA saw, upholding a candidate for President in 1976, that this would have a direct influence on the United States Supreme Court?

A. As President of the United States always has influence on his choices.

Q. Right, in the sense of appointment?

A. Yes. [72]

Example H

REQUEST No. 45. Paramount in furthering the cause of public education, as NEA, MEA, and MCCFA see it, is political action on the part of NEA, MEA, and MCCFA officials, staff personnel, and members, as described in subparts 1 through 5 of Request No. 42.

ANSWER No. 45. Denied.

ANALYSIS. One of the Resolutions of the MCCFA is that that level of the UTP "believes that political action on the part of members as well as the Association is paramount in furthering the case of public education". And the MCCFA has also expressed its conviction "of the importance of political activity on the part of its individual members as well as the Association as a whole". [73] In particular, the record indicates that this "political activity" includes the provision of campaign-support to candidates for election to public office."

Example I

REQUEST No. 46. Through the activities of their members and their institutional programs, NEA, MEA, MCCFA, Minnesota UniServ, IMPACE, and NEA-PAC have attempted, are attempting, and will attempt to exert the

⁷² See Example N, *infra* pp. 106-18.

maximum possible influence on the political system at the local, state, and national levels, through the activities described in subparts 1 through 5 of Request No. 42.

ANSWER No. 46. Denied.

ANALYSIS. NEA Executive Director Terry Herndon testified to the accuracy of the statement set out in Request No. 46.

Q. [by Dr. Vieira, for plaintiffs] * * * Has it been your experience that there is an absolute need [and] responsibility for the NEA to assert its maximum influence on the political system?

THE WITNESS [Mr. Herndon]: Yes. [74]

Example J

REQUESTS Nos. 47-56. [Not reproduced because of length.]

ANSWERS Nos. 47-56. Denied.

ANALYSIS. In Requests Nos. 47-56, plaintiffs sought to determine the extent to which the UTP had employed, or intended to employ, various types of political activism—including partisan politics, lobbying, propaganda and agitation, litigation, coalitions with other political organizations or causes, and collective bargaining—to achieve the goals set out in its Resolutions and New Business. The importance of this determination is two-fold. First, the NEA Resolutions and New Business “set a policy base for the activities of the NEA”. The Resolutions and New Business are what the NEA “stand[s] for”. [75] Second, courts have used the resolutions and new business items of an organization as evidence of its political character and activities.⁴¹ Therefore, if defendants admitted that a substantial number of the NEA Resolutions and New Business Items involved political activism, they would admit as well

⁴¹ See Vieira, *supra* note 3, 27 DePaul L. Rev. at 347.

the essentially political nature of the UTP, the central issue in this case.

One way for defendants to have answered Requests Nos. 47-56 in good faith would have been for them to compare the language of each Resolution and New Business Item to the definitions and descriptions of "partisan politics", "lobbying", and so on given throughout the Requests to Admit, and to judge whether each Resolution and New Business Item on its face implicated any kind of political activism in its implementation. Plaintiffs have had precisely such a study done. [76]

But an even more efficacious and easy method was available to defendants. Each fiscal year, the Office of the NEA Executive Director assigns NEA Resolutions and New Business to various goal areas and support services for implementation. The Directors of the goal areas and support services then delegate responsibility for action to their subordinates, and supervise the process of implementation. [77] At the fiscal year's end, the goal areas and support services prepare final reports for the Executive Office, which in turn compiles an overall report for the annual NEA Representative Assembly. [78] With these various implementation reports in hand, it would be relatively easy to determine how a particular Resolution or New Business Item had been implemented in any particular year. [79] Indeed, simply to produce these implementation reports for the years in question would be, in effect, to answer Requests Nos. 47-56.

Defendants, however, did not produce the implementation reports. Neither did they consult with the Directors of the NEA goal areas as to how particular Resolutions or New Business Items assigned to those areas had been implemented. [80] They simply denied what the implementation reports describe, what the Directors admit they know [81], and what NEA Executive Director Terry Hernon testified to as a commonplace [82].

Example K

REQUEST No. 60. As generally used by spokesmen for NEA, MEA, MCCFA, the UniServ units in Minnesota, IMPACE, and NEA-PAC, the term "teacher power" denotes influence or control by NEA members over public education policy by means of:

1. participating in collective bargaining through the device of exclusive representation such as has been established under the Minnesota Public Employment Labor Relations Act;

2. doing the things described in subparts 1 through 5 of Request No. 57.

ANSWER No. 60. Denied.

ANALYSIS. NEA President John Ryor testified that plaintiffs' understanding of the term "teacher power" as set out in Request No. 60 is correct.

Q. [by Dr. Vieira, for plaintiffs] * * * What does the phrase "teacher power" mean to you?

A. [Mr. Ryor] To me it means the influence of the local teachers and having some say, some control over their own professional, economic destinies as educators.

Q. That would involve collective bargaining?

A. Yes.

Q. Political action in terms of election campaigns?

A. It would involve political action.

Q. It would involve lobbying?

A. To a lesser degree, I suspect.

Q. To a lesser degree than political action?

A. Yes. [83]

NEA Executive Director Terry Herndon also informed the NEA convention that "teacher power" includes the "acquisition and consolidation of a power base for the profession", the "expansion and extension of effective intervention techniques such as bargaining and lobbying", "vigilant protection of the professional and human rights of every teacher", the "selling of the profession", "completing the unification of our state and local affiliates", and "organizing the unorganized teachers" [84]—that is, "teacher power" means collective bargaining, lobbying, litigation, propaganda and agitation, integration of the various levels of the UTP, and organizing. And the UTP national-level newspaper equates "teacher power" with monies contributed to the NEA-PAC, thus including partisan-political activism within the term. [85]

Example L

REQUEST No. 61. The various means detailed in Request No. 60 are essential to achieve the goals, objectives, programs, policies, or priorities of NEA, MEA, and MCCFA, and to advance the economic and professional status of NEA, MEA, and MCCFA members.

ANSWER No. 61. Denied.

ANALYSIS. Expert witness Dr. Craig Schneier, of the University of Maryland, has testified that the techniques of political activism that plaintiffs have identified—that is, support of candidates' campaigns, lobbying, propaganda and agitation, litigation, and coalitions with other political organizations and movements—are essential to the success of the UTP's goals, objectives, and programs. In his expert opinion, the UTP is essentially a political organization, precisely because it must employ these political techniques to attain its ends. [40]

Example M

REQUEST No. 62. Each of the means identified in Request No. 60 is of equal importance to the NEA, MEA, and MCCFA.

ANSWER No. 62. Denied.

ANALYSIS. NEA President John Ryor has testified that the UTP considers the various political techniques, or "tools", identified by plaintiffs to be of equal importance to the achievement of its goals.

Q. [by Dr. Vieira, for plaintiffs] Of these five tools then that you have identified, collective bargaining, lobbying techniques, plans of political action, legal aid funds and the internal NEA training programs, could you rank them in order of importance during the years of your tenure as NEA President?

A. [Mr. Ryor] Yes, all five are number one.

Q. They're all of equal importance then?

A. Yes. [86]

And on another instance:

Q. * * * can one draw from this the inference that NEA views the collective bargaining process * * * as one of the steps in or one of the procedures that could be followed among the six that are given as of equal importance with public relations, lobbying and the other activities that are discussed here [in Ryor Deposition Exhibit No. 46] * * * ?

A. That's fair.

* * *

Q. * * * What you're saying then is that collective bargaining is one of the tools or elements of the entire NEA program to achieve certain goals and objectives, and you treat it at the same level of importance as a

generality with such actions as public relations and lobbying in state and national legislatures?

A. That's true. [87]

Example N

REQUEST No. 64. The program of intervention and participation in partisan-political campaigns of candidates for election to public office at the state and national levels in which NEA, MEA, MCCFA, NEA-PAC, IMPACE, other state and local NEA affiliates, and their political-action committees engage, jointly or severally or in various combinations, through their officials, staff personnel, or members, includes the following activities:

1. collecting, organizing, analyzing, and publishing in the *NEA Reporter*, *MEAdvocate*, and elsewhere such political data as tallies of votes by individual members of Congress and state legislatures on major legislative issues related to NEA policies;

2. identifying key issues and areas for NEA activity in each general election;

3. strengthening political-action committees (PACs) of NEA's state affiliates, developing and administering plans and systems to obtain money contributions from NEA members to state and national PAC's, and integrating the operations of state and national PACs;

4. endorsing candidates for President, Vice-President, Congress, state legislatures, and other public offices;

5. encouraging, soliciting, mobilizing, organizing, training, and assisting NEA members to seek election as delegates to local, state, and national conventions of the major political parties, or otherwise to participate in party functions and activities;

6. encouraging, soliciting, mobilizing, organizing, training, and assisting officials and staff personnel of the NEA

organization, and NEA members generally, to participate in partisan-political campaigns of candidates for election to public office at the local, state, and national levels, through financial contributions, endorsements, and the provision of personal services.

ANSWER No. 64. Denied.

ANALYSIS. Defendants' denial of this Request is a glaring example of their bad faith. For the record contains numerous facts documenting each element of the UTP's program of partisan-political activism.

Publishing tallies of votes. In 1975, NEA President James Harris informed the NEA Representative Assembly that the organization

will continue to build on its outstanding political action record. We will keep a tally of votes on major issues related to Association policies by individual members of Congress. [88]

Each year, the UTP national-level newspaper publishes so-called "legislative report cards" and other lists that record the votes of congressmen on issues of interest to the UTP. [89] These lists are widely distributed to UTP members, and the state and local levels of the organization. [90] "

" The self-contradiction between defendants' denial of subpart 1 of Request No. 64 and their admission of Request No. 322 [90] highlights their bad faith and provides another example of their technique of admitting the mere existence of some fact, but denying its obvious significance. Everyone with any experience in politics understands that the purpose of such tallies as the UTP's "legislative report cards" is to bring legislators' voting records to the attention of the members of some group who will then support or oppose those legislators for election on the basis of their records. [91] If defendants will not admit or stipulate to such elementary inferences from the proven existence of the "legislative report cards" themselves, the trial in this case will doubtless be unconscionably prolonged.

Identifying key issues and areas of activity. Again in 1975, NEA President Harris told the Representative Assembly that the UTP would "identify key areas for political activity in the 1976 general elections". [88] This process of "targeting" issues and areas was nothing new to the UTP, as the organization's national-level *Handbook* indicates. [92] Indeed, the controlling basis for NEA-PAC or IMPACE financial support of any candidate has always been whether that candidate's views on particular legislative issues are consistent with UTP goals—or, in the words of an IMPACE flier, "whether a candidate's views and/or voting record are consistent with the needs of education and the politics of the united teaching profession". [93]

As early as 1972, the UTP conducted an election project entitled "Target '72", a purpose of which was to aid the campaigns of selected congressional candidates. In 1974, the organization conducted a larger election project called the "Get Mad Campaign" that aimed at electing a "pro-education" Congress by focussing on particular candidates and districts.²² In 1976, UTP staff-personnel targeted important United States congressional and senatorial elections, and consulted with officials and staff-personnel from the organization's state-level affiliates with regard to campaign problems in certain important areas. [94] And in 1978, a UTP governmental-relations consultant visited Minnesota to "assess" the campaigns of several candidates for national office—and, as plaintiffs' private detectives discovered, to provide at least one of those campaigns with direct UTP assistance.

Moreover, for the past several years the UTP, through the NEA-PAC and state-level PACs, has "prioritized"

²² After the 1976 Carter-Mondale presidential campaign, "Target '72" and the 1974 "Get Mad Campaign" are the two major UTP projects in the partisan-political arena about which defendants are most secretive.

congressional candidates—in terms of deciding which candidates have greater need for funds than others, which should receive more campaign-assistance than others, and so on. [95]

Strengthening political-action committees. Again in 1975, NEA President Harris spoke of UTP intentions to

intensify our efforts to strengthen state political action committees, to help develop systems to obtain member contributions to political action committees, and to mesh national and state political action. [89]

By 1976, the UTP had state-level political-action committees in nearly every state. [96, p. 16] And under a mandate from the national-level Representative Assembly, the state affiliates had been working for several years on systems for soliciting and collecting monies from UTP members for transfer to the NEA-PAC—with an ultimate goal of \$1 per year from each member. [98] UTP national-level staff-personnel assisted, and continue to assist, state-level PACs to improve their collection-systems. [99]** To date,

** Defendants have admitted as much in their Answer to plaintiffs' Request No. 94. [100] Yet this only highlights their bad faith in denying sub-part 3 of Request No. 64. It is not sensible, on the one hand, to admit (as defendants do) that "the NEA encourages and assists its state affiliates to develop political action committees to collect monies for contribution to campaigns of candidates", and, on the other hand, to deny (as defendants do) that this encouragement and assistance is one activity within the UTP's program of involvement in candidates' campaigns. If the encouragement of and assistance to state-level PACs are not part of a UTP program, why and how is the UTP doing them, as defendants admit? And if the encouragement of and assistance to state-level PACs are not connected to candidates' campaigns, why did defendants admit they are? And if, conversely, the encouragement and assistance are part of a UTP program connected to candidates' campaigns, how is defendants' denial of sub-part 3 of Request No. 64 proper?

various state PACs have employed several types of collection-systems, including the "reverse check-off",⁸⁸ the "positive check-off", direct contributions by the state PAC to the NEA-PAC, and special fund-drives. [2, pp. 43-44] For the past four or five years, however, the UTP has pressed its state-level affiliates and PACs to increase their contributions to the NEA-PAC through some form of "check-off" system. [101] The UTP has also solicited its members directly, through its newspapers and newsletters, to "make teachers a national political force" by contributing to the NEA-PAC, or to "support IMPACE for teacher political punch". [102]

Specifically in Minnesota, there is testimony with respect to training and assistance that the IMPACE provides those UTP members who solicit and collect campaign-monies on its behalf. [103] There is also testimony on the basic mechanism of an IMPACE fund-raising drive, including the estimate that 4,000 to 4,500 "collectors" are potentially involved in the yearly solicitation. [104] A system of political solicitations has been established in the community colleges, too, among MCCFA members. [105] And state-level UTP newspapers describe IMPACE rallies held over the years at Sleepy Eye, Minnesota, [106] Testimony has been given as well on the mechanism by which IMPACE staff-personnel monitor the progress of its fund-solicitations [107], and by which collections are forwarded to the IMPACE treasury [108]. Evidence on the existence of local-level PACs is in the record. [109] And there has been testimony that one of the activities of the MEA-GRC is to coordinate the activities of UTP members in fund-raising by candidates for election to public office separate from the IMPACE drive. [110]

⁸⁸ The UTP "reverse check-off" has recently been declared illegal under the Federal Election Campaign Act. *FEC v. NEA*, 457 F. Supp. 1102 (D.D.C. 1978).

Endorsing candidates. The UTP has endorsed candidates for election to public office in the elections of 1972, 1974, 1976, and 1978.²²

Both the NEA-PAC [59] and the IMPACE [111], as well as other state-level PACs [112], endorse candidates, either with or without financial contributions to their campaigns. The UTP provides its members with regular reports about candidate-endorsements, both in the primary [113] and in the general elections [114]. In 1976, the UTP endorsed its first candidate for President of the United States. [115] According to MEA Executive Director A. L. Gallop, the UTP presidential-endorsement procedure, begun in 1973, was "the most comprehensive and democratic process ever developed and implemented by a member organization"—and represented the intention of UTP members "to make a difference in presidential politics". [116] NEA Presidents James Harris and John Ryor voiced similar appreciations of the comprehensiveness of the UTP's endorsement process. [117] The MEA implemented the process fully. [118] Subsequently, the UTP developed a more flexible "multi-option" presidential-endorsement procedure that permits the organization to support candidates in the party conventions, as well as after their nominations. [119]

Besides these open endorsements of candidates, the UTP apparently has a system of "internal" endorsements, as a matter of policy at the NEA-PAC level [59], and as a matter of practice at the state level in Minnesota [120].

Delegates to party conventions. In 1975, NEA President Harris reported that the UTP

will seek to elect and organize teacher delegates to the national political party conventions. We expect to be

²² For a study of the evolution of the candidate-endorsement process at the national level of the UTP, see Shotts, Thesis, *supra* note 9.

well represented at these crucial nominating conventions where teacher delegates will influence party platforms and candidates for the presidency. [121]

Actually, the planning for UTP intervention in the 1976 Republican and Democratic National Conventions began in 1974, at both the national and state levels. [122] The goal of this planning was to maximize the number of UTP members attending the conventions as delegates [123], and thereby significantly influence the party platforms and the identities of party nominees [124].

Approximately two-thirds of the UTP's state-level affiliates developed programs to assist UTP members to become party delegates from their states. [125] The national-level staff provided assistance in the form of information and consultation. [126] MEA-GRC Chairman J. M. Sokup urged UTP members in Minnesota to attend precinct caucuses and other political conventions. "Teacher activists who occupy important positions in the two political parties", he wrote, "play a vital role in MEA's political action program". [127]*

MEA activists established time-lines and plans to aid UTP members at every step of the delegate-selection process in Minnesota, from precinct caucuses to state conventions. [129] The organization also collected names of teacher-delegates at every level—names that could be used later to solicit and recruit workers for candidates' campaigns. [130]

* During this period of time, the MEA-GRC's political program included aiding UTP political activists to "become the power actors in each of the political parties and political campaigns of 1976". As explained by Sokup, this meant that UTP members should "[o]ccupy leadership roles within the party and within the campaigns", such as becoming party officers or members of party committees, or campaign managers. [128]

In order to attempt to influence party platforms, the UTP urged its sub-units to send representatives to regional party hearings; and the organization's spokesmen testified at hearings of the parties' platform committees. [131] The UTP also urged its state and local levels to promote UTP members on the parties' rules, platform and credentials committees. NEA-GRD Director Stanley McFarland explained why:

Q. [Dr. Vieira, for plaintiffs] * * * you say, "Thus it is very important and extremely helpful to achieving the NEA's political program to have educators represented on these committees."

What was the NEA's political program to which the appointments to these various committees of the Democratic National Convention was important?

A. [Mr. McFarland] To influence the conventions, in terms of adopting platform and being involved, the rules are very important, the platform is very important and the credentials are an active working part of the convention. [132]

In cooperation with a coalition of membership-organizations called the "Labor Coalition Clearinghouse", the UTP developed detailed plans and carried out extensive activities to influence the 1976 Democratic National Convention. [133] The UTP's participation in the Republican National Convention was similar in purpose, although less extensive in operation. [134]

The UTP was also active in party caucuses in 1978 [135], and intends in 1980 to engage in activity similar to that it undertook surrounding the 1976 party conventions [136].

Campaign-workers for candidates. The oft-stated position of the UTP is that "what teachers can really deliver to their favorites at all levels is not money power, but

people power”—in terms of armies of campaign-workers recruited from among the UTP membership. [27] And the Chairman of the MEA-GRC understood it to be a goal of the UTP at both the national and state levels to aid favored candidates with campaign-workers whenever possible. [137]

Not surprisingly, then, during the period 1974 to 1978, the UTP national-level newspaper contained many stories dealing with the activity of the organization's members as campaign-workers. NEA-GRD Assistant Director Robert Harman admitted that these newspaper accounts were characteristic of activity in many UTP local units. [138] He then testified as follows:

Q. [by Dr. Vieira, for plaintiffs] In fact, it is true, is it not, that it has been the intention of the people connected with the governmental relations department of the NEA, yourself included, to try as much as possible or as much as expedient to promote activity in state and local affiliates of the NEA designed to encourage, enlist, and recruit teachers to become volunteers in a candidate's campaign?

A. [Mr. Harman] Yes.

Q. Do you feel you have been successful in those efforts over the years to some extent?

A. To a certain extent.

Q. To what extent on a scale of one to ten?

A. Two. Perhaps three.

Q. You have a lot of important work to do?

A. Yes.

Q. Are you engaged in activities to improve your score?

A. That is a constant effort. [139]**

MEA-GRC Chairman Sokup expressed an attitude similar to Harman's.

Q. [by Dr. Vieira, for plaintiffs] So during your tenure on the GRC was it your understanding * * * that the MEA through the GRC should try to promote involvement by MEA members in campaigns of candidates for public office at all levels, local, state and national in Minnesota?

A. [Mr. Sokup] Yes. [140]

This, indeed, was and is one of the major purposes of the MEA-GRC's so-called "1340 Club/Committee", to "generally lend a hand in candidates' campaigns", in terms of "[t]he whole range of candidate activities that a candidate engages in". [141]

Training is an important part of UTP activities related to recruiting campaign-workers. UTP national-level staff includes governmental-relations consultants capable of delivering training on a wide variety of campaign techniques. [142] In Minnesota, the UTP conducts an annual political-action workshop to instruct UTP activists in the practicalities of campaigns for election to public office. At such workshops, "teachers [are] challenged to give of their time, talent and money to * * * political campaigns"; and the "significance, value and necessity for dedicated volunteers [is] emphasized". [143] In addition to the annual workshop, the MEA and its local and UniServ units hold various follow-up training sessions focusing on political campaigns. [144] At such workshops and sessions, it is "stand-

** Significantly, Mr. Harman was able to agree with plaintiffs that the verbs "enlist" and "recruit" properly describe activities of the UTP relating to candidates' campaigns. Contrast the denial of defendants' counsel, *supra* note 55.

ard procedure * * * to identify endorsed candidates" and to encourage trainees to perform personal campaign-services on behalf of those candidates. [145]

Recruitment of campaign-workers from among UTP members takes many forms. There may be a sign-up sheet at a convention [146], identification-cards for political activists to fill out and return to UniServ offices [147], or direct recruiting of members by state- and local-level UTP staff-personnel [148]. A more round-about method may involve a candidate or candidate's staff-personnel contacting an NEA regional governmental-relations consultant concerning campaign-workers, with the consultant in turn passing the information along to people in the state or local levels of the UTP, or in state-level PACs, who then proceed to mobilize UTP members for the campaign. [149]

Historically, the role of the MEA-GRC has been

to encourage political participation and provide a network by which those who were interested could find others who were politically interested and give them an avenue of contact with the candidates. [150]

The GRC political-action network consists basically of lists of UTP members who have identified themselves as 1340 Club/Committee activists, graduates of political-action workshops and training sessions, delegates at precinct caucuses or other conventions of political parties, or participants in the MEA-GRC candidate-"screening" (interviewing) process. Leaders of the 1340 Club/Committee, UniServ GRC Councillors, and so-called "MEA legislative-district coordinators" or "contacts" use these lists in various ways to recruit UTP members for particular candidates' campaigns. [151] With a so-called "teacher-contact" as an intermediary, candidates endorsed by the IM-PACE have the use of such lists for mailings, soliciting volunteers, and other campaign-purposes. [152]

There are several mechanisms by which candidates come into contact with the MEA and, through it and its officials and staff-personnel, with UTP campaign-workers. In some cases, candidates can simply telephone the MEA-GRD or -GRC and be given the names of UTP political activists in their areas. [153] Sometimes, candidates being interviewed in MEA-GRC screening-sessions may suggest to the screeners their need for campaign-workers. Later, the screeners or other UTP members discuss the candidates' needs at UniServ GRC meetings, and communicate that need to rank-and-file teachers through the GRC's system of contacts in Minnesota school-buildings. [154] On other occasions, the Director of the MEA-GRD might learn of a candidate's desire for UTP campaign-workers through lobbying-contacts with the candidate, through approaches made by the candidate, or through information supplied by political parties. The Directors would then inform the GRC Chairman, who would use the list of MEA political activists to contact particular individuals in the candidate's legislative district, inform them of the candidate's needs, and request that they recruit campaign-workers from among UTP members. [155] At still other times, the Director might inform the MEA-GRC of the candidate's need for workers; and the members of the GRC would then pass the information along through the organization's contact-network. [156] And finally, there are instances in which the MEA-GRD may by-pass the MEA-GRC, and inform UniServ GRC Councillors or legislative-district contacts directly, with the understanding that these people will recruit UTP political activists on their own. [157] People in leadership positions in the MCCFA, as well as the MEA, are also involved in enlisting UTP members to work in candidates' campaigns. [158]"

"Again, an example of defendants' refusal to admit the obvious: In their Answer to plaintiffs' Request No. 93, defendants admitted that "MCCFA encourages its members" to participate in

UTP campaign-workers perform their tasks "[i]n storefront campaign headquarters, in education association offices, in their homes". [160] Sometimes, as well, they work in campaign-offices established by the candidates themselves. After their work is over, the UTP conducts surveys to determine the extent to which its members have been active in campaigns. [161]

Example O

REQUEST No. 69. Since in its view the delegates at the National Conventions of the Republican and Democratic Parties largely determine the policies and platforms of those Parties, NEA sees a critical need for its members to serve as delegates to, or otherwise to participate in, these National Conventions in order to promote its goals, objectives, programs, policies, priorities, and values.

ANSWER No. 69. Admit that it is John Ryor's view that delegates at the national conventions of the Republican and Democratic parties largely determine the policies and platforms of those parties inasmuch as the policy on education is part of the policies and platforms. Admit that it is John Ryor's view that there was a need for teachers to serve as delegates to the 1976 Democratic and Republican national conventions. Except as hereinabove admitted, request 69 is denied.

ANALYSIS. Defendants' Answer attempts to limit their admission to what constitutes "John Ryor's view". Defendants denied, however, that the Request states facts applicable to the UTP as an organization, and even that "John Ryor's view" is authoritative because of Mr. Ryor's position as NEA President.

candidates' campaigns, whereas the Request (based upon the facts) asked them to admit that "MCCFA encourages and solicits its members" to become campaign-workers. [159]

As NEA President, Mr. Ryor is "the chief executive and policy officer and official spokesperson of the Association". [162] His "views", therefore, reflect UTP policy—especially when the organization's own national-level newspaper quotes him describing the deliberations of the party conventions as a "critical political decision" and an "all-important policymaking process" in which UTP members "aim to share". [163] Defendants apparently intend to characterize Mr. Ryor's words and actions as those of a private citizen, not those of the highest UTP official. NEA Executive Director Terry Herndon's testimony unequivocally indicates, though, that participation in party conventions by UTP leaders is participation by individuals representing the UTP, not simply themselves. [164] And statements by MEA leaders as to the importance of party conventions to the organization and its members also appear in the record. [165]

In any event, it was not merely the caprices of Mr. Ryor, private citizen, but rather a complete organizational commitment at the local, state, and national levels, that set in motion the exhaustive planning and activities surrounding the UTP's involvement in the 1976 Democratic and Republican National Conventions, detailed in *Example N*, *supra* pp. 111-13, and *P*, next.

Example P

REQUEST No. 70. In appropriate years, the NEA and many of its state and local affiliates have established and administered, and will establish and administer, programs to encourage, solicit, mobilize, organize, train, and assist NEA members to become delegates to, or otherwise to participate in, caucuses and conventions of state and national political parties.

ANSWER No. 70. Admit that the NEA encourages NEA members to become delegates to conventions of both major

political parties. Except as hereinabove admitted, request 70 is denied.

ANALYSIS. Again, defendants refused to admit that a UTP political program exists to "solicit, mobilize, organize, train, and assist" UTP members to participate in political-party affairs, as well as merely to "encourage" them. The record, though, is clear.

MEA-GRC Chairman J. M. Sokup testified that a "major focus" of the MEA-GRC was to create a "political action organization that will see MEA members be a dominant force at the precinct caucuses" and that would assist teacher-activists to "become the power actors in each of the political parties" by "[o]ccupy[ing] leadership roles within the party". [128] In Minnesota, the UTP established and operated a comprehensive program for intervention in political-party affairs, going far beyond mere "encouragement" of members. So-called "precinct-caucus training kits", prepared by MEA governmental-relations staff-personnel [166], were distributed to UTP political activists at state-wide training sessions that "aimed at how to organize and conduct training for teachers prior to caucus involvement, using data collected by the Political Action Data Project (PADP)" [167]. The intent of these sessions was to train cadres to use PADP lists to solicit other UTP members to attend precinct caucuses. [168] In 1975-1976, MEA officials and staff-personnel trained some 300 such cadres [169], and in 1977-1978, a "couple hundred" [170]. The cadres were then to train other UTP members at the UniServ, local-association, and school-building levels. [171] At the UniServ level, the MEA-GRC provided materials to all UniServ GRC Councillors; the UniServ GRCs held local meetings for their own activists; and these activists then solicited UTP members in school-buildings to attend precinct caucuses, using (among other things) posters supplied by the MEA-GRD. [172] Besides generating detailed plans for precinct-caucus organizing

[173], the MEA-GRC also conducted follow-up activities to maximize the amount of training done throughout the State [174].

The organization also employed a standard "report form", on which those UTP members attending precinct caucuses could list their names, addresses, telephone numbers, and various kinds of political data. From these forms, MEA governmental-relations staff-personnel prepared master-lists and provided these lists to UniServ offices for further organizing efforts in party affairs, and for developing lists of potential lobbyists and campaign-workers. [175]

Subsequent to the precinct caucuses, there were also UTP organizing efforts, including workshops, directed at the party district and state conventions. [176] The NEA, of course, also established a program directed at the national conventions, as described in *Example N, supra* pp. 111-13.

Example Q

REQUEST No. 75. During 1975 and 1976, MEA staff personnel prepared and distributed so-called "precinct-caucus training kits", the major purpose of which was to encourage, solicit, train, and assist MEA members to seek and secure election as delegates to the 1976 state and national conventions of various partisan-political parties.

ANSWER No. 75. Admit that during 1975 and 1976, Mr. Erskine and Mrs. Rohrs prepared and distributed "precinct-caucus training kits", the major purpose of which was to encourage MEA members to seek election as delegates to the 1976 Minnesota and 1976 national conventions of the Democratic and Republican parties. Except as hereinabove admitted, request 75 is denied.

ANALYSIS. Once again, defendants refused to admit that UTP activities aimed at maximizing attendance at pre-

cinct caucuses involve more than mere "encouragement" of the organizations' members. Defendants' denial of "training" by the MEA is particularly ludicrous in this instance, since they admitted that "precinct-caucus *training kits*" were prepared and distributed.

Defendants apparently also intend to deny that "Mr. Erskine and Mrs. Rohrs" were acting in an MEA staff-capacity when they prepared and distributed the kits—even though both Erskine and Rohrs were full-time salaried employees of the MEA-GRD during 1975 and 1976.

In any event, *Example P, supra*, describes the purpose and use of the training kits.

Example R

REQUEST No. 84. NEA-PAC representatives have attended and will attend fund-raising or other functions benefitting partisan-political candidates or parties.

ANSWER No. 84. Admit that NEA-PAC representatives have attended fund-raisers for candidates for public office. Except as hereinabove admitted, request 84 is denied.

ANALYSIS. Defendants' denial of NEA-PAC involvement in fund-raising activities benefitting parties is in patent bad faith. The UTP national-level newspaper, answering the question "Why is NEA-PAC funding required every year?", says: "The two major political parties * * * conduct fundraising events every year. NEA-PAC participates in these various events." [177] NEA-GRD Director Stanley J. McFarland also testified as to NEA-PAC contributions to political parties:

Q. [by Dr. Vieira, for plaintiffs] * * * Can you give us any examples of what other activities of political parties NEA-PAC budget is used to finance?

A. [Mr. McFarland] We can by law make up to a \$15,000 contribution to both national political parties.

Q. And historically that is, in the last four or five years, has NEA-PAC made contributions each year to the parties?

A. Yes, by buying tickets to fund raising dinners, Democrat and Republican. [178]

Example S

REQUEST No. 91. NEA uses the *NEA Reporter*, MEA uses the *MEAdvocate*, and MCCFA uses the *Green Sheet*, to solicit their members' votes for partisan-political candidates for election to public office at the state and national levels.

ANSWER No. 91. Admit that the MEA Advocate of October 15, 1976, contained an editorial encouraging support for Carter/Mondale. Except as hereinabove admitted, request 91 is denied.

ANALYSIS. The October 1976 issue of the *NEA Reporter* proves this denial false. As NEA President John Ryor testified, that issue contained a column in which Mr. Ryor solicited UTP members to vote for the Carter-Mondale ticket in the 1976 presidential election. [179]

The issue of the *MEAdvocate* published immediately prior to the 12 September 1978 primary elections in Minnesota also belies this denial. [180] On page 1 appears an article "MEA backs Fraser in primary battle", with a colored overlay in large-scale type reading "Vote in the primary election, Tuesday, Sept. 12"—an obvious solicitation of readers of the *Advocate* to vote for Fraser. A similar technique is used on page 8, where there appears a picture and text describing a candidate Sikorski (also endorsed by the IMPACE), with a box set in large-scale type below, reading "Vote in the primary election, Tuesday, Sept. 12". And other pictures of IMPACE-endorsed candidates, with captions, appear on pages 3 (candidate Freeman) and 7 (candidate Vento).

Example T

REQUEST No. 97. A goal of NEA and NEA-PAC is to solicit and collect at least \$1.00 from every NEA member for contribution to partisan-political campaigns of candidates for election to public office at the national level.

ANSWER No. 97. Admit that a goal of NEA-PAC is to collect at least \$1.00 from every active NEA member. Except as hereinabove admitted, request 97 is denied.

ANALYSIS. That the collection of \$1 from every UTP member each year is a goal of the NEA, as well as of the NEA-PAC, is evident from the goal having been adopted in a 1973 New Business Item of the NEA Representative Assembly. [177]

Examples U & V

REQUEST No. 106. In order to encourage, solicit, mobilize, organize, train, or assist NEA members to intervene or participate in partisan-political campaigns of candidates for election to public office at the local, state, and national levels, NEA officials and staff personnel, in cooperation with officials and staff personnel of state and local NEA affiliates and their political-action committees, including MEA, MCCFA, and IMPACE:

1. produce and distribute materials nationwide;
2. design and conduct "political-action work-shops" and "leadership-training sessions" throughout the United States; and
3. otherwise encourage, solicit, mobilize, organize, train, or assist NEA members in partisan-political activity.

ANSWER No. 106. Admit that the NEA encourages its members to participate in campaigns of candidates for election to public office. Except as hereinabove admitted, request 106 is denied.

REQUEST No. 107. NEA, MEA, IMPACE, and UniServ units in Minnesota conduct an annual "political-action workshop" in Minnesota, the purpose of which is to encourage, solicit, mobilize, organize, and train MEA members to participate in partisan-political campaigns of candidates for election to public office at the local, state, and national levels.

ANSWER No. 107. Admit that the NEA and MEA conduct an annual "political-action workshop" in Minnesota, at which teachers are encouraged to participate in campaigns of candidates for election to public office. Except as hereinabove admitted, request 107 is denied.

REQUEST No. 118. Officials and staff personnel of MEA, NEA, IMPACE, and UniServ conducted the political-action workshop to which reference is made in Request No. 117 for the purpose of encouraging, soliciting, mobilizing, organizing, training, and assisting MEA members to participate in partisan-political campaigns of candidates for election to public office at the local, state, or national levels.

ANSWER No. 118. Admit that officials and staff personnel of MEA, NEA and UniServ conducted the political-action workshop to which reference is made in request 117 for the purpose of encouraging MEA members to participate in campaigns of candidates for election to public office. Except as hereinabove admitted, request 118 is denied.

REQUEST No. 120. Officials and staff personnel of MCCFA, MEA, IMPACE, and UniServ conducted the political-action workshop to which reference is made in Request No. 119 for the purpose of encouraging, soliciting, mobilizing, organizing, training, and assisting MCCFA members to participate in partisan-political campaigns of candidates for election to public office at the local, state, or national levels.

ANSWER No. 120. Admit that officials and staff personnel of MEA, NEA, UniServ and IMPACE conducted the po-

litical-action workshop to which reference is made in request 119 for the purpose of encouraging MEA members to participate in campaigns of candidates for election to public office. Except as hereinabove admitted, request 120 is denied.

ANALYSIS. Here, too, defendants refused to admit to political involvement other than "encouragement". *Example N, supra* pp. 113-18, provides a general refutation of this denial. Specifically with respect to political training of UTP activists, the record contains the following additional facts.

The UTP makes training in political action available to virtually every category of individual in the organization; and virtually every category of individual connected with the UTP—including NEA governmental-relations consultants; NEA staff-personnel from the Affiliate Relations, Communications, and Research Departments; state-level governmental-relations staff-personnel; state- and local-level UTP officials; local-level staff-personnel; UniServ Directors; and professional political consultants on retainer—delivers such training. [181] The various levels of the organization, moreover, make political training available on a regular basis. [182]

Political training in the UTP operates generally on the "cadre" system. [183] (The idea is to train a relatively small group of instructors, who will then train many others.) In Minnesota, the MEA seeks to make its political trainees "expert transmission belts into the locals"—with the expectation that (i) the trainees will return to their UniServ units and local education-associations to organize teams of political activists there; and (ii) the trainees will participate in local political activities themselves. [184]

In the national-level "Leadership Development Academy", the UTP provides instruction in the techniques of political activism. [185] In Minnesota, according to the testimony of IMPACE Chairman Roger Johnson,

discussions at seminars or workshops where the subject of how a teacher can help their candidate get elected have centered around coffee parties, go door-knocking, introduce themselves to your friends and neighbors, help them stuff envelopes, help them in their telephone trees, you know, all the various campaign activities that come in those books that are published by both political parties on how to conduct a successful campaign. Those have all been discussed. [186]⁷⁰

Finally, the UTP's political-action training sessions are not merely academic—but serve as springboards and sounding-boards for practical politics, as testimony of MEA-GRD Director Gene Mammenga explains:

Q. [by Dr. Vieira, for plaintiffs] Would you look at Exhibit number 28 * * * [p]age ten specifically, an article entitled "Political workshop keys Anoka bond election win. A smashing victory in an October 2 bond issue election in the Anoka-Hennepin School District is being viewed by local association leaders as a victory for organized teacher advocacy on the local government level." Then dropping down to the last paragraph, "The AHEA 'person-to-person' campaign was patterned after techniques learned by Anoka delegates to the August MEA Governmental Relations workshop at Bemidji. The GRC Committee is planning to further refine the techniques learned during the highly successful campaign."

During your tenure can you think of examples similar to this in which members or officials of locals have

⁷⁰ For examples of training-materials in political action used at UTP workshops, see Composite Exhibit G, Exhibit I, and Exhibit J attached to plaintiffs' Requests to Admit. The authenticity of these documents has been admitted in defendants' Answers Nos. 111, 117, and 119.

been trained in the state workshops then go forward to use that training in political activity of this kind and then their experience becomes feedback for further refinement of the training that's done by MEA?

A. [Mr. Mammenga] Yes. * * * There are occasions when our participants in a conference such as St. Scholastica will become interested in school board elections, for example, and attempt to elect a candidate or defeat an incumbent and will use techniques that they have become familiar with at the conference to do that. And then we will use them back again at the conference by saying "here's somebody who learned something and applied it to a specific situation and she will tell us how she did it and you will be able to profit from that experience."

Q. In fact that's one of the purposes of these conferences, isn't it, precisely to train teachers for local activities of this kind and therefore to refine the MEA's ability or the ability of MEA members, shall we say, to be successful in political activity of the type described here?

A. To develop expertise in an individual so they would be more effective in that activity. [187]

Example W

REQUEST No. 109. Among the duties of UniServ officials and staff personnel in each State, including Minnesota, are encouragement, solicitation, mobilization, organization, training, or assistance of NEA members to participate in partisan-political campaigns of candidates for election to public office at the local, state, and national levels.

ANSWER No. 109. Denied.

ANALYSIS. Defendants' denial of this Request is a prime example of their attempts to distort the record with respect to the political activities of UniServ. That UniServ

is deeply implicated in all facets of the UTP's political activism, including candidates' campaigns, is not open to question, however. Indeed, the absurdity of defendants' denial lies in the central role that UniServ officials such as UniServ GRC Councillors play in the entire MEA-GRC political operation, as detailed in *Example N, supra* pp. 113-18. As MEA-GRC Chairman J. M. Sokup testified,

[d]uring the period from 1974 to 1977 [i.e. period of Sokup's tenure] all UniServ Units had a Governmental Relations Council chairperson. And all UniServ Units had at least on paper a program for political action. The degree to which there was activity within that UniServ varied * * *.

Q. [by Dr. Vieira, for plaintiffs] When you use the term "political action" * * *, you would include the election of candidates to local and state offices?

A. Yes. [188]

That UniServ Directors were also deeply involved in organizing the MEA-GRC's contact-network and its teams of political activists in the 1340 Club/Committee is beyond doubt as well. [189]

Moreover, in 1977 the UTP performed the most detailed study of the UniServ program ever attempted, in which appear the following results and conclusions:

When asked to describe the kinds of activities the UniServ units are engaged in, staff members reported considerable involvement in activities related to politics, with particular emphasis on the electing of candidates to local office (95%) and state office (94%). A lower level of involvement is reported by staff for electing candidates to office at the federal level (88%).

The degree to which these activities are considered appropriate to the UniServ unit tends to run parallel

to the levels of involvement noted in the activity as described above.

In terms of how successful they are in carrying out these functions, success at the state level is reported at 83%, at the local level at 77%, and at the federal level at 69%.

• • • •

Training for political action is an area in which most UniServ units claim involvement (96%).

• • • •

Other areas in which state presidents report that their UniServ units are heavily involved with high levels of success are electing candidates for office on a state level (92%), • • • political activity for electing candidates to office on both the local (87%) and federal level (87%) and training for political action (87%).

• • • •

Without exception local presidents, including local presidents in density areas, said they were involved in political activity for electing candidates on the local level. Success in this area was reported by 88%.

Other areas in which virtually total involvement (99%) was expressed were political activity for electing candidates to office on the state level • • •.

• • • •

Only two other activities were participated in by more than 90% of sparsity presidents' units. These were political activity for electing candidates on the local level and the state level, each at 94%. Sparsity presidents believe they have a higher degree of success at the state level (80%) than at the local level (72%).

• • • •

It was recommended that:

UniServ services be • • • expanded further in the following areas:

1. Political action [1, pp. 17-19, 42]

Because of their involvement in political activism, UniServ staff receive regular training in politics, including the opportunity to attend the NEA's Advanced Political Training Conference. [190] Indeed, UniServ staff-participation in candidates' campaigns is a regular occurrence, as NEA-GRD Assistant Director Robert Harman testified:

Q. [by Dr. Vieira, for plaintiffs] With respect to candidates for state office and candidates [for] federal office, such as congressmen and senators, you are aware, are you not, of numerous instances in which UniServ staff have been involved in get-out-the-vote activities at least?

A. [Mr. Harman] Yes. I think there are many activities like that going on around the country.

Q. And have been for a number of years?

A. Yes. [191]

NEA-GRD Director Stanley McFarland also testified about the involvement of UniServ staff-personnel in campaigns:

Q. [by Dr. Vieira, for plaintiffs] I am wondering if there are any circumstances under which UniServ staff people under your auspices or through your intermediation have come to be assigned to particular campaigns of candidates to perform particular services or duties with respect to the activities of state or local affiliates with respect to those campaigns?

A. [Mr. McFarland] Yes, I am sure they have. I don't remember the instances. [192]

A specific example of the NEA-GRD aiding in the provision of UniServ staff-personnel for a campaign occurred in the Henry Howell gubernatorial candidacy in Virginia in 1977. [193] And in 1976, the UTP called upon every

UniServ Director in the United States to participate in a massive get-out-the-vote drive among UTP members on behalf of the Carter-Mondale ticket. [194]

Example X

REQUEST No. 127. According to a report of the NEA Executive Director, in 1974 NEA, NEA-PAC, and the political-action committees of some NEA affiliates played an important role in changing the course of government at the state and national levels.

ANSWER No. 127. Denied.

ANALYSIS. Defendants' bad faith or willful disregard of their duty to make reasonable inquiry could not be more obvious than in this denial. For the Minutes of the NEA Board of Directors for 15-16 November 1974, at 482, read as follows:

Executive Secretary Terry Herndon reported on the following areas:

A. Congressional and State Elections

NEA, NEA-PAC, and the political committees of some affiliates played an important role in changing the course of government both on the congressional level and at the state level. * * * [195]

Example Y

REQUEST No. 131. Both privately and in public statements, many partisan-political candidates for election to public office at the state and national levels tend to put high value on campaign support by NEA members, in part because of the intensity with which those members and their organizations undertake such "nuts-and-bolts" campaign duties as the ones described in COMPOSITE EXHIBIT G.

ANSWER No. 131. Denied.

REQUEST No. 133. EXHIBIT K is a true and accurate copy of the NEA News Release "Winning Candidates Laud Teacher Power in Wake of Election, A Report", dated 9 Nov., 1976.

ANSWER No. 133. Admitted.

ANALYSIS. Here is another example of defendants' self-contradictions. The exhibit identified in Request No. 133 provides some of plaintiffs' evidence for the statement made in Request No. 131. Indeed, Exhibit K is a series of statements from candidates praising UTP members for their activities as campaign-workers in the 1976 elections.

Another representative piece of evidence is a report published in a UTP newsletter on the election victory of Stanley Lundine in early 1976. The report quotes Lundine as saying,

"[t]his is an election that could not have been won without the enthusiastic support and involvement of many teachers." The new Congressman explained that teachers "operated phone banks, drove cars, sat babies and did all the pedestrian things so vital to victory."

NYEA Elmira-Corning area staffer Jack Schamel said credit goes to area teachers who worked hard to contact their colleagues on behalf of Lundine. He also praised the teachers' get-out-the-vote drive that produced the large Lundine vote. Schamel told *Common Sense* he'd like to add special thanks from the teachers of the Elmira-Corning area "to NEA for making available election pros like Joe Letorney, Rick Lathrop and Ben Laime to help us get the job done." [196]

Example Z

REQUEST No. 105. NEA, MEA and MCCFA believe that:

1. the provision of personal services by NEA, MEA, and MCCFA members to partisan-political campaigns of candi-

dates for election to public office is more important than financial contributions, because highly trained and motivated teachers who volunteer for "nuts-and-bolts" campaign duties can provide candidates with a service that money cannot buy; and

2. the greatest partisan-political resource of NEA, MEA, and MCCFA is personal services contributed to campaigns by NEA members.

ANSWER No. 105. Denied.

ANALYSIS. The evidence supporting Request No. 105 is substantial in amount and authority. First, the idea that campaign-workers are more important than campaign-contributions appears in an organizational newsletter directed to UTP leaders:

The new federal election law limits NEA contributions to \$5,000 per candidate. But what teachers can really deliver to their favorites at all levels is not money power, but *people* power. [27]

NEA Executive Director Herndon agrees:

Q. [by Dr. Vieira, for plaintiffs] Would you consider, sir, that the most effective means by which NEA participates in campaigns for election of individuals to public office is contributions of services by NEA members to those campaigns as opposed to financing through NEA-PAC and state and local political action committees?

A. [Mr. Herndon] Yes. [197]

MEA-GRC Chairman J. M. Sokup agrees:

Q. [by Dr. Vieira, for plaintiffs] Was it your understanding that it's sometimes more important from the point of view of candidates to have volunteers suppl[ied] to them to perform campaign work than it is

even for them to receive financial contributions from organizations such as IMPACE?

A. [Mr. Sokup] Did you say was that my view?

Q. Was that your understanding of the situation at least in this state [i.e., Minnesota]?

A. That was my view of the situation. [155]

MEA-GRD Director Gene Mammenga agrees:

Q. [by Dr. Vieira, for plaintiffs] * * * [Mr. Klinkerfues, IMPACE Chairman,] says "We are operating in an era when the contribution of campaign money alone will reap ever diminishing returns without intensive political activity on our part within the political parties and the injection of campaign workers to assist candidates."

From your perspective as an individual involved both with IMPACE and with MEA-GRD, would you concur that in 1976 and subsequently that really does reflect the truth of your situation, MEA's situation?

A. [Mr. Mammenga] Yes, * * * increasing importance should be given to the time contributions of members as over against a simple dollar contribution from the political fund.

Q. And that includes both activity within the parties and within campaigns of candidates?

A. Primarily within the campaigns of candidates [198]

And the philosophy of the MEA-GRC 1340 Club/Committee rests on the same proposition:

Recent changes in Minnesota's campaign financing law which will significantly reduce the need for IMPACE * * * money reinforces the need for greater teacher involvement. [199]

In sum, defendants' denials of each of these Requests to Admit is without basis in the record. Plaintiffs will not impose upon the Court by bringing forward even more examples of defendants' bad faith in this regard. A complete alphabet of illustrations is enough. What merits emphasis, though, is that each of the Requests to Admit analyzed above deals with a, if not *the*, critical issue in this case: the involvement of the UTP, its officials, staff-personnel, and members in the campaigns of candidates for public office. And in each instance, defendants have demonstrated their determination to "stonewall", by denying the Requests and refusing to answer the accompanying Interrogatories, notwithstanding their duties under Federal Rule 36 and this Court's repeated injunctions to the parties to come to a stipulation of facts surrounding the fundamental questions in this litigation.

Mr. Eric Miller, Esq., told this Court at the 13 October 1978 hearing that defendants

have responded to 381 requests for admission. • • • I won't show you the responses we put in, but • • • we have admitted to a substantial number of fundamental facts in this case.

• • • We had difficulty with some of these requests and we have either denied them or some of them we have admitted in a limited fashion.

If we were to take our responses to those requests for admissions we would come up with a fairly fundamental framework in terms of admitted facts. [200]

As Mr. Miller said then, defendants did not show the Court "the responses [they] put in". But plaintiffs have done so here. And that showing establishes that, at least with respect to the Requests dealing with the UTP's involvement in candidates' campaigns, defendants have *not* "admitted to a substantial number of fundamental facts in this case". Neither do their responses provide "a fairly fundamental

framework in terms of admitted facts". If anything, their approach to plaintiffs' Requests to Admit demonstrates that the process of admission has yet to begin in any meaningful sense.

B. DEFENDANTS HAVE REFUSED TO STIPULATE TO FACTS CONCERNING THE UNITED TEACHING PROFESSION'S POLITICAL ACTIVITY THAT THE RECORD IN THIS CASE, AND THE PUBLIC RECORD, FIRMLY ESTABLISH.

Defendants have also resorted to "stonewalling" in response to certain suggested stipulations advanced recently by plaintiffs in a letter to defendants' counsel. [201] These stipulations deal with two important issues: (i) the role of UniServ in the UTP's program of political activism at the local, state, and national levels; and (ii) the UTP's involvement in the 1976 Carter-Mondale campaign. Defendants have refused to accede to either stipulation.

The first suggested stipulation reads as follows:

STIPULATION 1. UniServ plays a significant role in the United Teaching Profession's activity in relation to the campaigns of candidates for election to public office at the local, state, and national levels. First, UniServ enables the United Teaching Profession to operate effectively in regard to candidates' campaigns by coordinating all three levels of the organization—local, state, and national. Second, UniServ staff-personnel receive training in how to engage in and direct political-campaign activity as a part of their services to the local and state education associations for which they work. Third, UniServ staff are occasionally released from their other duties so that they can serve on the campaign-staffs of candidates for public office. This kind of practical activity in political campaigns provides UniServ staff with first-hand understanding of political action that they can use in working with and for local education associations, as well as making available

trained personnel to candidates who support the legislative and other political goals of the United Teaching Profession. The provision of personal campaign services is often more important to a candidate than endorsement or financial contributions by a political-action committee such as the National Education Association Political Action Committee, or such political-action committees of state education associations as the Independent Minnesota Political Action Committee for Education.

That the record supports this stipulation fully, *Examples W and Z, supra* pp. 128-32 and 133-35, demonstrate. Even more revealingly, Stipulation 1 tracks the language of a scholarly study of UTP political activity performed in 1976 by C. T. Shotts, of Indiana University, and now in the public record. Table I compares Stipulation 1 to the relevant passage from Shotts.

The second suggested stipulation reads as follows:

STIPULATION 2. In broad outline, the plan to mobilize the organizational forces of the United Teaching Profession to help elect the Carter-Mondale ticket in 1976 involved three elements. First, organizational energies were focused at the grassroots level to maximize the number of teacher supporters for the candidate, generate teacher volunteers, and maximize teacher turnout on election day. Second, a full-time coordinator of teacher support activities was identified in each state to work with the Democratic Party leadership and state Carter-Mondale campaign staff. Each state coordinator was selected before the United Teaching Profession endorsed Carter-Mondale, so that he could become familiar with other political activities of the United Teaching Profession in his state, the positions of the candidates, and in general become familiar with and begin planning for support activities. The coordinators were drawn from state and UniServ staff ranks.

Third, teacher support activities for the Carter-Mondale ticket were varied. The type of activity undertaken by the United Teaching Profession on behalf of the candidates was determined by governmental relations staff in consultation with the candidates' campaign managers.

Plaintiffs' took this stipulation, almost verbatim, from section four of the NEA Governmental Relations Program to Implement the NEA Presidential Endorsement Procedure, which appears as Appendix G in the Shotts study.¹¹ Table II compares Stipulation 2 to the text of the plan given by Shotts. Unfortunately, because of defendants' misconduct the record in this case is not as complete as plaintiffs desire with regard to the UTP's involvement in the 1976 Carter-Mondale campaign. None the less, the record does show much that corroborates by inference the campaign-mobilization plan printed in Shotts' Appendix G.

First is the compelling circumstantial evidence that the UTP implemented every other section of the Program to Implement the NEA Presidential Endorsement Procedure, more or less as written. The organization prepared its members to support a presidential endorsement in 1976, mobilized organizational forces to affect selection of party nominees, and worked to gain party and candidate support for UTP positions, as *Examples N, O, P, and Q, supra* pp. 111-13 and 118-22, indicate.

Second, UTP staff-personnel drew up contingency plans [202]; and NEA President John Ryor called upon UTP state associations to provide the national level with plans for aiding the Carter-Mondale campaign [25, p. 4]. Third, the UTP extensively propagandized its membership, dis-

¹¹ Again, the term "mobilize" is not foreign to the UTP vernacular in relation to campaign-workers. Contrast the denials of defendants, *supra* note 55.

TABLE I

STIPULATION No. 1

UniServ plays a significant role in the United Teaching Profession's activity in relation to the campaigns of candidates for election to public office at the local, state, and national levels. First, UniServ enables the United Teaching Profession to operate effectively in regard to candidates' campaigns by coordinating all three levels of the organization—local, state, and national. Second, UniServ staff-personnel receive training in how to engage in and direct political-campaign activity as a part of their services to the local and state education associations for which they work. Third, UniServ staff are occasionally released from their other duties so that they can serve on the campaign-staffs of candidates for public office. This kind of practical activity in political campaigns provides UniServ staff with first-hand understanding of political action that they can use in working with and for local education associations, as well as making available trained personnel to candidates who support the legislative and other political goals of the United Teaching Profession. The provision of personal campaign services is often more important to a candidate than endorsement or financial contributions by a political-action committee such as the National Education Association Political Action Committee, or such political-action committees of state education associations as the Independent Minnesota Political Action Committee for Education.

²⁷ NEA, *Handbook, 1970-71*, p. 9.

²⁸ George D. Fischer, interview, *op. cit.*

²⁹ Donald E. Morrison, interview, *op. cit.*

C. T. SHOTTS THESIS [2, pp. 62-63]

The Uniserv program was the third item that Fischer cited as having impact on NEA's political activity. The Uniserve program was developed in the early 1970's as a climax of the unification movement. It was designed to place at the local level a skilled staff person who could defend local members' interest in all matters from the negotiation table to public relations to the improving of instruction. The Uniserv staff was directly responsible to the association(s) served, but alliance with NEA enabled them to use the resources of the state and national associations in assisting local association(s).²⁷

Fischer noted that the importance of Uniserv to political activity rested in the fact that the Uniserv program was one in which educators at all levels could trust—it was above the suspicion of being self-serving. He expressed the belief that even though Uniserv was a controversial program, it had been valuable in that it had enabled the NEA to become effective politically as a national organization by providing the opportunity for coordination at all three levels: local, state and national.²⁸

Don Morrison observed that the Uniserv program also provided staff members for small associations who would not normally have been able to afford to hire them. He noted another significant advantage in that the Uniserv staff personnel were trained to engage in and direct political activity as a part of their services to the associations for which they worked. Morrison observed that occasionally the Uniserv staff were released from their staff positions for a period of time so that they could serve on the campaign staff of candidates for public office. This kind of activity provided the Uniserv personnel with excellent first-hand knowledge of politics and gave them a much better understanding of how to work in political action with and for their associations, as well as providing very valuable trained personnel for the candidate. That fact, Morrison noted, was often more important to a candidate than endorsement or financial contributions.

TABLE II

STIPULATION No. 2

In broad outline, the plan to mobilize the organizational forces of the United Teaching Profession to help elect the Carter-Mondale ticket in 1976 involved three elements. First, organizational energies were focused at the grassroots level to maximize the number of teacher supporters for the candidate, generate teacher volunteers, and maximize teacher turnout on election day. Second, a full-time coordinator of teacher support activities was identified in each state to work with the Democratic Party leadership and state Carter-Mondale campaign staff. Each state coordinator was selected before the United Teaching Profession endorsed Carter-Mondale, so that he could become familiar with other political activities of the United Teaching Profession in his state, the positions of the candidates, and in general become familiar with and begin planning for support activities. The coordinators were drawn from state and Uniserv staff ranks. Third, teacher support activities for the Carter-Mondale ticket were varied. The type of activity undertaken by the United Teaching Profession on behalf of the candidates was determined by governmental relations staff in consultation with the candidates' campaign managers.

C. T. SHOTTS THESIS [2, p. 141]

4. *Mobilize organization forces to elect the endorsed Presidential candidate*

Organizational energies will be focused at the grassroots level to maximize the number of teacher supporters for the candidate, generate teacher volunteers, and maximize teacher turnout on election day. For purposes of persuasion (to vote for the endorsed candidate) and get-out-the-vote activities, teacher also includes spouse and voting age family members.

A full-time coordinator of teacher support activities will be identified in each state to work with the party leadership and state campaign staff of the endorsed candidate. The coordinator should be selected after both party nominees are selected but prior to completion of the endorsement process so that the staff person can become familiar with other NEA political activities in the state, positions of potential endorsees, and in general become familiar with and begin planning for support activities. The coordinators will be drawn from state and UNISERV staff ranks.

Teacher support activities for the endorsed candidate will be varied. The type of activity undertaken by NEA on behalf of the candidate will be determined by GR staff in consultation with the candidate's campaign manager. For instance, NEA has a wealth of talent among its staff that could be useful to a Presidential campaign if the campaign needs such services during the final month and a half. NEA in conjunction with NEA-PAC could make these services available to the campaign if requested to do so. One definite activity will be to inform every member of the NEA endorsement and the candidate's pro-education positions and other high qualifications. ALL NEA-authorized activities will be in compliance with the 1971 Federal Election Campaign Act as amended.

tributing posters [203], a film [204], buttons [205], and stories about the campaign in UTP publications [206]. Fourth, UTP staff-personnel conducted a telephone-sample of the organization's members with respect to their attitudes on the presidential election. [207] Fifth, the organization implemented a massive get-out-the-vote drive among its members, employing UniServ Directors and others to set up telephone-banks throughout the country. [208] Sixth, UTP national-level staff-personnel served as conduits of information between the local, state, and national levels of the organization, on the one hand, and the Carter-Mondale campaign, on the other. [209] Seventh and most important, the UTP targeted certain states as key areas for maximizing the participation by UTP members in congressional and presidential campaigns. NEA regional governmental-relations consultants contacted regional Carter-Mondale campaign-directors and told them whom to contact in the state- and local-levels of the UTP. [210] The national-level offices provided the Carter-Mondale campaign with lists of NEA "field people" and important individuals in state affiliates—the expectation being to promote collaboration among them in campaign-activity. [211] In short, the NEA "acted as a broker", urging and assisting its state and local affiliates to contact the Carter-Mondale campaign in the hope of enlisting large numbers of UTP members as campaign-workers. [212]

What does not appear in this record is how "teacher coordinators", drawn from the ranks of UTP state-level and UniServ staff, were chosen to supervise UTP campaign-workers and cooperate with local party leaders and Carter-Mondale campaign staff; who those coordinators were; or what precisely they did. On this subject, defendants have been totally silent.

That it would make little practical political sense for the UTP to establish a nationwide program of "brokerage" and support for the Carter-Mondale candidacy without

identifying regional UTP representatives at the state or local levels to supervise activities there, seems evident to plaintiffs, particularly in light of the plan to that effect printed in the Shotts study. After all, the NEA-GRD prepared this plan no less than twenty-one months before the 1976 presidential elections. In that period of time, that the organization could have failed to find appropriate staff-personnel to serve as coordinators is hardly plausible.¹¹ That the organization would have abandoned the idea of coordination altogether is even less plausible, coordination being obviously fundamental to the operation of a coherent national campaign-program.

None the less, defendants have refused to stipulate to the description of the UTP's involvement in the Carter-Mondale campaign set out in their organization's own statement of its projected program.

III. Defendants Have Withheld Substantial Amounts of Relevant Documents That Plaintiffs Requested They Produce for Inspection.

In the absence of admissions or stipulations, plaintiffs have sought to prepare a detailed record through the analysis of documents obtained from defendants under Federal Rules of Civil Procedure 34 and 45. Plaintiffs' efforts, however, defendants have largely frustrated by withholding relevant documents with neither notice nor explanation. To be sure, at the 13 October 1978 hearing, Mr. Eric Miller, Esq., counsel for defendants, represented to this Court that defendants

have been very open in terms of responding to this discovery. * * * We have had a lot of discovery, it has been expensive, and the 50,000 pages [of material produced] * * * is conservative; those pages have been plucked out of many more times than 50,000 pages to

¹¹ MEA-GRD Director Gene Mammenga probably filled the role of state-coordinator in Minnesota. *See infra* pp. 219-22.

arrive at those. My office has spent a lot of time * * * looking through records * * *. We are not interested in going any further. [213]

Mr. Miller's remarks, however, contained a *double entendre*: For the documents that defendants have "plucked out" of the UTP's files represent only a small proportion of what they should have produced, without any "plucking" or editing on their part.

As Mr. Miller's statement to the Court suggests, the "plucking" of documents may have been time-consuming for defendants and their counsel—as well as resulting in substantial withholding of documents requested by plaintiffs (as shown below). None the less, in complex litigation of this sort, neither the time involved,⁷² nor the mere volume of relevant documents,⁷³ nor the difficulty of retrieving those documents from filing-systems that conceal rather than disclose records, or that make it hard to identify or locate them,⁷⁴ can excuse a failure to produce materials

⁷² *Horenstein v. Gulf Oil Co.*, 20 F.R. Serv. 2d 1258, 1261 (D. Mass. 1975); *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976), citing *Luey v. Sterling Drug, Inc.*, 240 F. Supp. 632, 634-35 (W.D. Mich. 1965). The party from whom discovery is sought is not privileged to decide, *sua sponte*, that discovery is excessive, and then to take direct action to limit it.

⁷³ *E.g.*, *United States v. American Telephone & Telegraph Co.*, No. 74-1698 (D.D.C., 11 Sept. 1978), Slip. op. at 38 (government entitled to production of 2.5 million pages of documents; defendants concede that government could require production of 12 million pages).

⁷⁴ *Alliance to End Repression v. Rochford*, 75 F.R.D. 441, 447 (N.D. Ill. 1977); *Kozlowski*, *supra* note 72, at 75-76 ("[t]o allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purpose of the discovery rule").

In several Local Rule 5 and other conferences, defendants' counsel have indicated that certain documents requested by plaintiffs

pursuant to requests under Federal Rules 34 and 45. In short, the controlling question is not whether defendants have had or would have a difficult task satisfying plaintiffs' requests, but instead whether defendants have complied and will comply in good faith with the requirements of Federal Rules of Civil Procedure 34 and 45.

The latter question defendants' conduct has already answered in the negative.

A. DEFENDANTS HAVE LIMITED THEIR PRODUCTION OF CERTAIN GENERAL FILES, AND OF THE NATIONAL EDUCATION ASSOCIATION ARCHIVES, TO WHAT THEY SAW FIT TO PRODUCE, NOTWITHSTANDING PLAINTIFFS' REQUESTS AND THIS COURT'S ORDER.

Defendants' business-managers have testified that the UTP's program-budgets and accounts do not permit anyone to determine the activities (in terms of specific behavior) of the organization's officials, staff-personnel, and employees. [214] To analyze the activities of individuals at the MEA level, for example, the manager says that plaintiffs would have to depose each individual [215], or examine all MEA invoices, expense-records, check-stubs, vouchers, and so on to reconstruct (if possible) their day-to-day activities [216].⁷⁵ UTP officials and staff-personnel, however, have testified that they do not keep records from which such a reconstruction is possible. [218] And the organization's own top executives have criticized its so-

are scattered throughout the files of one or another level of the UTP, and that defendants refuse to search those files to assemble the documents. The problem of dispersed documents emphasizes the need for this Court to grant plaintiffs direct access to the UTP files. See Part V., *infra* pp. 323-31.

⁷⁵ Defendants have objected to the production of UTP invoices, expense-records, *et cetera*, on grounds of burdensomeness and irrelevance. [217]

called "accomplishment reports" as lacking criteria, definitions, detail, meaning, and specific descriptions of what the UTP did and how much it cost. [219]

Aware of these deficiencies in the UTP's system of record-keeping, plaintiffs have endeavored to determine the pattern of activities of UTP officials, staff-personnel, and departments by examination of the organization's basic working-materials, including general correspondence, reports, memoranda, and similar documents.¹⁶ Specifically, plaintiffs requested defendants to produce the "correspondence-files" of certain of their staff-personnel prior to the latter's depositions, including all

letters, written correspondence, memoranda to the file, internal and external memoranda, press releases released under the individual's name, written records of telephone conversations, and written records of discussions. [220]¹⁷

Throughout the course of discovery, plaintiffs have interpreted the term "correspondence-file" to mean all such materials, wherever the particular deponent maintained them or had had them filed. Thus, if a deponent kept a copy of document X in a file-cabinet in his office, or had instructed someone to store a copy of X in some other file under his control, document X was part of the deponent's "correspondence-file", as far as plaintiffs were concerned. Defendants, however, have produced little of the aforesaid materials except where those materials had already been

¹⁶ On the usefulness of these documents for determining the substantial involvement of the UTP in political activism, see Vieira, *supra* note 3, 27 *DePaul L. Rev.* at 348 & nn. 229-32.

¹⁷ Such a designation by general category is sufficiently precise to satisfy the requirements of Federal Rule 34, since a reasoning individual can determine the documents requested. 4A J. Moore, *Federal Practice* para. 34.07, at 35-56, citing *Cooper v. Dasher*, 290 U.S. 106, 109-10 (1933).

collected in a particular file or files designated "correspondence" (or some similar term).¹⁸ To expedite discovery, plaintiffs have not moved this Court for orders to compel the complete production of the several deponents' "correspondence-files" one-by-one; rather, they have chosen to consolidate all their claims in the instant Motion, after termination of discovery established defendants' bad-faith intention to produce no more than they had made available according to *their* interpretation of the term "correspondence-file".

Even under that narrow construction, defendants have not been willing to state that they have produced all the documents the existence of which is known to them. From the deposition of Director of NEA Communications Susan Lowell comes the following admission:

Q. [by Dr. Vieira, for plaintiffs] Mrs. Lowell, * * * what we are trying to find out is why certain documents were provided and others were not.

¹⁸ For example, in the deposition of NEA-GRD Director Stanley McFarland appears the following colloquy:

Q. [by Dr. Vieira, for plaintiffs] It is strange, sir, the September TWX didn't appear in your correspondence file. Do you have any reason?

A. [Mr. McFarland] It is very unusual that TWX messages would appear in my correspondence file.

Q. Not the way we define correspondence file. That would be anything that came in and out of your office directed to you with your name on it.

MR. MILLER [counsel for defendants]: I might comment for the record, that's the first time that has been defined to us in that fashion.

DR. VIEIRA: It is defined in [defendants'] response to request for production of documents * * *.

There is a definition there. He can look at that later.

MR. MILLER: Mr. McFarland need not be involved as to what you say what the definitions are between lawyers. * * *

MR. GOODWIN [counsel for defendants]: I can tell you why. We produced, subsequent to communications with counsel to make sure your demands were not too totally burdensome and onerous that we couldn't comply without having a battle in court. As you know we produced what was in her correspondence file, and what was not in the file was not produced.

MR. VIEIRA: Is that the representation you are making for the record, that all material in Mrs. Lowell's correspondence files was produced, bar none, over the last few days?

MR. GOODWIN: I am not going to make that representation—I didn't say every document. I am making the representation we produced what we agreed we would produce pursuant to agreement with you. Without going back and checking, I am sure we produced what we were supposed to produce.

MR. VIEIRA: Based on your personal knowledge? You oversaw the production?

MR. GOODWIN: You heard my statement. [222]

Moreover, because of defendants' unilateral restriction of the scope of the term "correspondence-file", plaintiffs' access to relevant documents has been seriously circumscribed. For instance, NEA Governmental Relations Consultant R. Dick Vander Woude produced only a small folder of documents that he happened to maintain under the title "Dick's Correspondence"—a folder that did not contain obviously relevant material connected with the campaigns of candidates for election to public office that Vander Woude keeps in his home-office. [223] NEA Governmental Relations Consultant Joseph Letorney produced a smattering of materials a part-time secretary "perchance" had "happened to save"—"to try to give you [i.e., plaintiffs] something that would indicate the corre-

spondence", as opposed to constituting it *in toto*. [224] NEA-GRD Assistant Director Robert Harman admitted that defendants had failed to produce relevant correspondence that had not yet been filed, but rather sat on his desk—and had been in his possession for a month before his deposition. [225] Director of NEA Communications Susan Lowell explained that internal UTP reports that crossed her desk and were the subject of her other correspondence did not appear in her chronological correspondence-file—because they happened to be "kept differently". [226] And NEA-GRD Director Stanley McFarland indicated that the documents made available to plaintiffs prior to his deposition had come from the small files in his personal secretary's office—although materials to and from him he had directed be filed throughout the NEA-GRD offices. [227]

The deposition of NEA Archivist Alice Morton records an even more glaring example of defendants' bad-faith refusal to provide full disclosure of documents. Prior to that deposition, Magistrate Renner had ordered defendants to produce

all documents in the NEA archives pertaining to the participation, from January 1972 to the present time, of the NEA or its affiliates, or their officials, staff personnel or members, concerning activities related to the campaigns of candidates for election to public office. [228]

As the Morton deposition-transcript shows, however, defendants did not comply with this Order. Instead, they produced "selected portions" that they considered relevant, according to criteria known only to themselves:

Q. [by Mr. Bryant, for plaintiffs] To your knowledge, are the four agendas for the executive committee [that defendants produced] the only ones in your files which show a discussion of political activities?

. . . .

THE WITNESS [Ms. Morton]: I do not have all the agenda books from 1972 until now. I have not looked. Those that I have recently came to the archives and I have not had an opportunity to scan those that I do have.

BY MR. BRYANT:

Q. Would you produce the other copies of the agenda for the executive committee that you have so that we can look through them to determine whether or not there is such a discussion?

. . . .

MR. SELTZER [counsel for defendants]: No further agendas will be provided.

BY MR. BRYANT:

Q. Will you produce the agendas in your file for all meetings of the board of directors of NEA since 1972 for us to inspect?

MR. SELTZER: Those agendas and materials . . . have been examined and selected portions of those have been produced, and no further items in our judgment are relevant and therefore no further items in that regard will be produced.

In addition, defendants refused to produce the index to the Archives, on the ground that (in their opinion) it did not come within Magistrate Renner's Order:

Q. Do you have a written index somewhere which indicates what the material is that is in the archives?

. . . .

THE WITNESS: I have some guides that will be helpful.

Q. Will you get them please?

MR. SELZER: That is not within the magistrate's order. I don't think we will be producing those.

MR. BRYANT: You are telling the witness not to produce them. Is that correct?

MR. SELZER: That is correct.

Moreover, the testimony and comments of counsel indicated that what documents defendants had produced represented, not all of the materials available and known to them, but only what defendants considered a "fair sampling" of the Archives' contents concerning UTP political activism:

A. [Ms. Morton]: * * * In view of the fact that I did not have the subpoena nor did Mr. Selzer have the subpoena, he explained to me that we were supposed to make available materials related to the subject following the year 1972 until now. He came yesterday morning. We went into the stack area. I pointed out the areas where the subject materials were located.

He went through the collection, and he selected materials that he thought might be relevant to the subject * * *

. . . .

Q. You have a file on CAPE [i.e., the Coalition of American Public Employees]?

. . . .

Q. And that is in one box?

A. Right.

. . . .

Q. Do we have all of the materials that are in that box?

A. I didn't examine what he [i.e., Mr. Selzer] brought here, but listening, I don't want to say for sure.

Q. Can you go look?

MR. SELZER: We will tell you that the box has been examined. I do not believe we have all of the materials. I do not believe we have all of the materials in the box. We do have a fair sampling, and those are the only documents that will be produced.

. . . .

Q. Now, we have here with us some materials from your governmental relations files, do we not?

A. Yes.

Q. But in the archives, there is still a considerable amount of material in your governmental relations files which have not been produced.

A. That is true. . . .

. . . .

Q. Will you produce it for our inspection?

MR. SELZER: No. The governmental relations files have been examined in the course of compliance with the subpoena. All relevant documents insofar as we have been able to determine have been produced and no further materials of that kind will be produced.
[229]

In sum, throughout the course of document-discovery defendants have produced only what they saw fit to "select" as a "fair sampling" of the materials requested, have refused to identify relevant documents they knew existed but did not produce, and have failed to disclose the location of documents that, for one reason or another peculiar to the UTP filing-systems, are not maintained in "correspondence-files" strictly so-called. No warrant for these actions exists under Federal Rules 34 or 45. Under Rule 34, for instance, defendants have the burden to demonstrate before the Court that documents plaintiffs

have requested are irrelevant to the issues in this case; they have no unilateral privilege to withhold material they think is irrelevant." That they have done so, and done so consistently even in the face of Magistrate Renner's Order of 22 December 1978, is compelling evidence of their bad faith.

B. DEFENDANTS HAVE NOT CONSULTED THE DEONENTS WHOSE FILES THEY PURPORTED TO PRODUCE WITH RESPECT TO THE COMPLETENESS OF THE MATERIALS MADE AVAILABLE FOR PLAINTIFFS' INSPECTION.

That the various UTP staff-persons plaintiffs deposed are more knowledgeable than defendants' counsel as to the location and contents of their files is self-evident. That the burden is therefore on defendants' counsel to consult with these individuals as to the completeness of document-production made on their behalf under Federal Rule 34, and particularly under Rule 45, is also self-evident. Defendants' counsel did not follow this course, however.

The deponents played no role whatsoever in the production of what defendants represented as the deponents' full "correspondence-files". According to their testimony, they did not know the meaning of the controlling term "correspondence-file" (Baker, McFarland), or the pertinent text of Magistrate Renner's Order (Morton); they did not know what materials plaintiffs wanted (Morton); they did not point out their files, or the location of their documents, to anyone (Baker, McFarland); they did not consult or have discussions with anyone in regard to what

¹⁰ *E.g.*, 4A J. Moore, Federal Practice para. 34.06, at 34-38; *Murphy v. New York & P.R.S.S. Co.*, 27 F. Supp. 878, 880 (S.D. N.Y. 1939) (party may not withhold documents on unsupported claim they contain no relevant information); *United States v. National City Bank*, 7 F.R.D. 68, 69-70 (S.D.N.Y. 1946) (party may not edit documents, or withhold portions claimed not pertinent to case).

documents were to be produced (Baker, McFarland); they did not review for completeness the files defendants' counsel assembled (Baker, Harman, McFarland, Morton); indeed, they did not have any real involvement at all (Baker, McFarland)—even though they knew that many of their documents were in locations other than their own filing-cabinets, and would have so informed anyone who asked (McFarland). One was "not in the office at the time" (Baker); another "wasn't even in town" (Watts); and a third "kept wanting to know what [plaintiffs] want to see" (Morton), but was never told. Only defendants' counsel participated in the collection of documents, without the direct or indirect assistance or supervision of the individuals whose files Federal Rules 34 and 45 required them to find and produce *in toto*:

Rosalyn Baker

Q. [by Dr. Vieira, for plaintiffs] Mrs. Baker, are you familiar with the term "correspondence file" as has been used by counsel in this case?

A. [Mrs. Baker] No.

Q. When did you learn that the plaintiffs had requested your counsel to make available certain of your documents for production and copying?

. . . .

Q. How did you learn?

A. I think I received a memo from counsel saying that I was being requested to be deposed.

Q. Did they ask you to produce certain documents for them to inspect—counsel, that is?

A. They asked me to make the files available.

Q. What files?

A. My personal files.

Q. Did someone come down to your office and ask you to show them where your personal files were?

A. Someone came down to the office but I was not in the office at the time.

Q. Do you know who that someone was?

. . . .

A. First name is Marty. I don't know that I ever knew what her last name is.

Q. Do you know what she did when she came down to the office?

A. I can only speculate. I was not there at the time.

Q. Did you have any discussions with Marty or anyone else subsequent to the time she came to the office with respect to which of your documents were being produced in this case?

A. No, I merely asked her what she was doing.

Q. What did she tell you she was doing?

A. That she was preparing files for this particular case. I said, "Fine".

Q. Did you consult with her or anyone else with respect to which documents should be produced?

A. No.

Q. Did anyone come to you after Marty had been in your office and ask you if there were any other documents than the ones they had collected that should be produced * * * in this case, to make your correspondence file complete?

A. No.

Q. Did you have any other discussions with anyone with respect to document production in this case?

A. No.

Q. Would it be fair to say that your involvement in the production of documents in this case was merely pointing out to someone where your file cabinets were or indicating to them where your file cabinets were?

A. I didn't even do that. I wasn't in the office at the time they started looking at my files.

. . . .

Q. You didn't have any part, did you, in collecting the documents that were produced today?

A. No. [230]

Robert Harman

Q. [by Dr. Vieira, for plaintiffs] * * * Prior to coming to this deposition, did someone show you the notice of your deposition, say, "Mr. Harman, you are going to be deposed and here is the document that will require you to appear"?

A. [Mr. Harman] I don't recall that.

Q. Did someone inform you that you were going to be deposed.

A. Yes.

Q. Who was that someone?

A. Faith Hanna [i.e., NEA staff counsel].

Q. And did Ms. Hanna or anyone else tell you that plaintiffs had requested that certain documents be brought together and produced for their inspection
* * *

A. Yes.

Q. Who was that person?

A. Faith may have told me. I am not certain whether Faith talked with me or Beverly Good, who is an ad-

ministrative assistant and manages our support services.

Q. At any time did anyone come to you and say here is a list of the types of documents or categories of documents that the plaintiffs want produced in this case, can you tell us where they are or what of these you have, how we can get them?

A. No. Although Beverly Good had such a list, I believe. She showed me the materials she had.

I indicated that she should see that it was provided. And as far as I know, that was done.

Q. After Beverly Good did whatever she did, did you review the documents that she had collected to determine for yourself whether or not those documents were the ones that had been requested or whether something else should be put in or taken out of the file?

A. I did not. [231]

Stanley McFarland

Q. [by Dr. Vieira, for plaintiffs] When did you first learn that the plaintiffs in this case had requested that your correspondence be made available for inspection * * * ?

A. [Mr. McFarland] I don't remember specifically. I know my assistant manager came to me sort of perturbed that some people from the Legal Counsel's Office were digging through the files, and I have no memory of the date. It has to be for a specific purpose, so I said, give them all the cooperation you can.

Q. Did you participate in any way in aiding your assistant manager to deal with this problem?

A. No.

In fact, when they were delivered back in the office, I just instructed the secretary to put them back where they came from.

Q. Do you know who else participated in this activity the assistant manager was involved in, if anyone?

A. My secretary, Mrs. Good.

Q. Subsequent to the search of your files, did anyone come to you with a set of documents and have you review them and say these things are correspondence?

A. No.

Q. Did you consult with anyone at that time with respect to what documents should or should not be produced?

A. Absolutely not.

* * * my only involvement was the knowledge that the facilities were being looked at.

Q. So you were never involved in any activities directed to suggesting which documents should be produced, which not, is that correct?

A. By who?

Q. By anyone?

A. No.

Q. You were never involved in any activities trying to point out to someone where they might find some documents?

A. I personally was not.

Q. * * * Have you ever seen this thing before [i.e., the definition of "correspondence-file" used by plain-tiffs]?

A. I don't remember ever seeing it.

Q. Looking at the definition that is given there of correspondence file, * * * at the time that you were aware that someone was digging around in your files outside your office, next to your secretary's office, were you aware that things of the nature described here, letters, memoranda, telegrams and so on that had been received by you or sent by you at some time or other in the last two or three years were to be found, perhaps not in your files, but in someone else's files in the Governmental Relations Department?

A. This matter was never discussed.

Q. * * * at that particular time, were you aware that there were things of yours that you also sent or received that you wouldn't find in your own files, but you might find in the PAC files, you might find in Harman's files?

A. * * * I did not, was not involved with this and did not give it a thought.

Q. But you just testified a moment ago you received these PAC minutes.

A. Yes.

Q. You didn't have to worry about the PAC minutes because you knew they would be in the PAC files, no matter what you did with this copy that crossed your desk.

So if someone had said to you at this time, where can I find a copy of all the things that McFarland has received from PAC, you would say, as far as the minutes are concerned, go to the PAC file and you will find a copy of everything I received there because I received all the minutes.

Is that not correct?

A. I guess if I were asked that question, that's the way I would respond, yes.

Q. Do you understand at that time there were things of yours that could be found, correspondence that came to you that could be found around the NEA building other than in Stanley McFarland's own file cabinet, is that correct?

A. I was never asked.

Q. * * * is that correct in your own mind, that you knew of this?

A. Certainly.

Q. So if someone had come and asked you that, that's the answer you would have given?

If someone had come to you and said, Mr. McFarland, we can't find anything else in your file about PAC, do you know if there are any PAC materials that you received on file anywhere, and you would have said you could look in the NEA-PAC file, is that correct?

A. Yes.

Q. Did anyone approach you and ask you that question any of those documents that you thought existed somewhere other than in your file cabinet * * * at the time the documents were produced?

A. No.

Q. Did you volunteer that information to anyone, go out and say to your secretary or administrative assistant, "be sure you look in the PAC file"?

A. When they started to get into my files, I didn't pay any attention to it. I had other things to do.

Q. Who was the "they" you referred to?

When "they" started to get into your files?

A. The legal counsel's office.

Q. Who were those people in particular?

A. I don't really know.

Q. It was just brought to your attention there was someone from the legal counsel's office who was fiddling around, and you washed your hands of the whole matter?

A. Yes.

. . . .

Q. With respect to the documents that we have consulted today, * * * did anyone come to you prior to this deposition, show you these documents, and consult with you as to whether or not these documents were complete in the sense that anything else should be added to them?

A. No.

. . . .

Q. At the time these documents were produced, did anyone approach you with copies of * * * McFarland Deposition Exhibit 85 and * * * 86 and ask you if any other documents should be produced to make these materials complete or more complete than they are?

A. No one asked me any questions about these documents. [232]

Alice Morton

A. [Ms. Morton] * * * Mr. Selzer [i.e., counsel for defendants] * * * explained to me that we were supposed to make available materials. * * * He came yesterday morning. We went into the stack area. I pointed out the areas where the subject materials were located.

We went through the collection, and he selected materials that he thought might be relevant * * *.

. . . .

Q. [by Mr. Bryant, for plaintiffs] * * * when you were looking through your files for documents to produce here today, you were unaware of the contents of paragraph 2 [i.e., of Magistrate Renner's Order] at the time you did that.

A. That is exactly right. As a matter of fact, I pointed out the areas, and my attorney made the selection. And I have not looked at these materials, some of them.

* * *

Q. Well, you have said that you did not select these materials. Isn't that correct?

A. That is correct.

Q. All right; that your attorney did, and by that, I assume you mean Mr. Selzer.

A. Mr. Selzer, yes.

Q. You pointed out to him, I assume, the general areas in the archives where you felt these materials would be stored.

A. That is correct. And he very conscientiously went through the materials.

* * *

A. * * * he explained at length what he needed, what he was looking for. * * *

Q. * * * you pointed out the areas, your counsel went through the materials and selected the items that are present here. Is that correct?

A. That is correct.

* * *

A. * * * we went through those areas, and Tad [i.e., Mr. Selzer] pulled what he thought was relevant, was of importance.

* * *

Q. When did you first become aware of the contents of paragraph 2 of the magistrate's order of December 22nd, 1978?

A. When you produced the document or the subpoena this morning.

Q. The NEA general counsel's office was aware that you were subpoenaed very shortly after that subpoena was issued, wasn't it?

A. Yes, the first subpoena, yes.

Q. Before yesterday morning, did you have any prior notice of what you would be looking for?

A. No. I suspected from the heading on the check what it might be, but I was told that that would be explained to me.

Q. But yesterday was December 28. Correct?

A. I think so.

Q. And you didn't have a prior conversation with counsel or anyone else from December 22nd to December 28th?

A. * * * I made some inquiries about what was going on, and I was told that the time for this deposition would be today, and that is the gist of it.

Q. But you had no idea, really, what specifically you might be required to look for?

A. Specifically, no. In fact, I kept wanting to know what did you people want to see. * * * [233]

Gary Watts

Q. [by Dr. Vieira, for plaintiffs] A couple of days ago, some documents that were purported to be from your correspondence files were presented to us at the NEA Building for inspection and copying.

Did you participate in the selection of the documents that were presented to us?

A. [Dr. Watts] No, I did not. I was asked which cabinets and I pointed the cabinets out. I am not sure I did that. The secretary did that.

Q. But you had no participation in terms of choosing which documents out of those cabinets were to be—

A. I wasn't even in town. [234]

Defendants' systematic exclusion of these deponents from the entire process of document-identification, -collection, -review, and -production constituted bad faith *per se* under Federal Rules 34 and 45. It also deprived plaintiffs of substantial amounts of relevant information, as Part III.C., *infra* pp. 164-74, shows.

C. DEFENDANTS HAVE PRODUCED ONLY A SMALL PORTION OF THE FILES OF THEIR STAFF-PERSONNEL THAT PLAINTIFFS REQUESTED THEY PRODUCE.

Besides using their own definition of "correspondence-file" and failing to consult with the deponents as to the completeness of document-production, defendants have also withheld substantial amounts of material from the files they copied or permitted plaintiffs to inspect.²² They have, as defendants' counsel Miller told this Court on 13 October 1978, "plucked out of many more times than 50,000 pages" the documents they deigned to provide to plaintiffs.

²² The process of inspection of documents has always involved the intermediation of defendants' counsel. In Minnesota, defendants' counsel supplied plaintiffs with xerox copies of those documents that counsel represented as constituting the particular materials plaintiffs had requested. In Washington, D.C., defendants' counsel made available a room in the NEA Building to which they brought documents for inspection and copying by plaintiffs. On occasion, they also supplied copies of documents.

The deposition-transcripts catalogue the discrepancies between the amounts of materials the deponents kept on file, and the amounts defendants produced for plaintiffs' inspection:

Rosalyn Baker

Q. [by Vieira, for plaintiffs] * * * Could you describe * * * the * * * system of document storage that you use in your offices at the NEA Building * * * ?

* * *

A. [Mrs. Baker] I have some files by alphabetical correspondence. I have some state files and files by subject, files that we keep for comment on regulations * * *.

Q. Do you maintain these files in some sort of * * * file cabinets * * * ?

A. In file cabinets.

Q. How many file cabinets do you have in your office?

A. Two that I call my files.

Q. How many drawers in each?

A. I really don't know. I guess they are standard.

Q. Standard metal files cabinets.

A. Yes. [235]

"Standard metal file cabinets" for office-use have four drawers. Two such cabinets would have eight drawers. Defendants, however, produced the equivalent of only two drawers of documents prior to Baker's deposition—that is, only 25% of the amount available. [A-2, A-3, A-4, and A-5]

Kenneth Bresin

Q. [by Dr. Vieira, for plaintiffs] Now when you get a memorandum that you don't simply throw away, * * *

what do you do with it * * * ? Do you have some method for storing it?

A. [Mr. Bresin] I give it to the office manager and she files it in the appropriate subject file.

Q. Well, what happens if * * * you want to get a memorandum that you dealt with * * * ? Do you have to go and call a secretary to go out to the main files and hunt the thing down?

A. Usually, you know. On occasion I will hunt myself.

. . . .

Q. In other words, if one wanted to go back and reconstruct, if possible, all the materials that had crossed your desk in the course of a month, six months or a year, * * * one would have to go back through the files and essentially look piece by piece to pull out the ones that had the name Ken Bresin on them?

A. Yah. It looks like you have got most of what I produced. I don't have anything like that, that you have produced today.

Q. I'm glad you used the word that you produced today. Did you ever see any of this material in the last * * * four or five days, before today?

A. No.

Q. Did you have anything to do with producing the material that you have seen today, entered as Exhibits, in the sense of checking it and turning it over to us?

. . . .

A. No, I have not.

. . . .

Q. Now you're talking about the files that the MEA Governmental Relations Department maintains, in

which all of these documents cross your desk essentially are put?

A. Ah huh.

Q. Could you describe physically what kind of files those are?

A. They are black, four-drawer. They pull out in the front.

Q. Standard metal file cabinets of four drawers apiece?

A. Yes.

Q. How many of them are there?

A. Oh, three or four. I think three.

Q. So you're talking about twelve drawers? About a dozen drawers of files?

A. Ah huh. [236]

To be sure, Bresin's documents did not fill all of the twelve file-drawers in the MEA-GRD. But defendants produced *none* of his documents at all prior to his deposition.⁵¹ [A-6]

Robert Harman

Q. [by Dr. Vieira, for plaintiffs] How extensive is that file in terms of space occupied, one drawer?

A. [Mr. Harman] I wouldn't think more than a couple of drawers of the material that has been retained.

Q. A couple of standard file drawers?

A. Two to four I would guess.

⁵¹ All of the Bresin documents introduced as exhibits at his deposition plaintiffs gleaned from the files of other deponents, as it were, by happenstance.

Q. Somewhere between half and a full file cabinet, standard metal file cabinet?

A. I am guessing. But that would be about right.
[237]

Prior to Harman's deposition, however, defendants produced only a small fraction of the total amount of material Harman indicated existed—indeed, somewhat less than a single file-drawer. [A-7].²²

Joseph Letorney

A. [Mr. Letorney] * * * My office is in my home * * *.

Q. [by Dr. Vieira, for plaintiffs] What would you say with respect to the files that you do keep as to their total volume in terms of file cabinet drawers, two drawers, three drawers?

A. About four or five drawers.

* * *

A. I was asked to submit a correspondence file for this deposition and my answer was that I did not maintain a correspondence file because I don't have a secretary.

I * * * did upon the request for correspondence file call upon the secretary of the regional director * * * and I asked her if perchance she happened to save any copies because I wanted to try to give you something that would indicate the correspondence, and she said she did, and what she sent me is what I sent along.

²² There is evidence that defendants have destroyed or are in the process of destroying portions of Harman's files, including documents that post-date the filing of plaintiffs' Complaint. Part III.E., *infra* pp. 190-92.

I didn't even know they existed. [238]

Letorney maintained four or five file-drawers of materials; but all defendants produced was what some secretary "perchance . . . happened to save"—documents that Letorney himself "didn't even know . . . existed", and that served only to "indicate the correspondence", not to constitute it completely. In all, what Letorney arranged to produce amounted to but a minute compilation. [A-8 and A-9]

Alice Morton

Q. [by Mr. Bryant, for plaintiffs] From the areas in the shelves that you pointed out to your counsel, to your knowledge, are there other files in those areas which pertain to NEA or its affiliates' political involvement that are not out here [i.e., produced for plaintiffs' inspection]?

. . . .

THE WITNESS [Ms. Morton]: I cannot say, because I really don't know what you have. And this morning, he [i.e., Mr. Selzer, counsel for defendants] went through some materials in the Teacher in Politics collection and pulled out some materials and I don't know what is in that material. There may be others back there that he didn't pull out. I don't know.

. . . .

Q. Now, we have here with us some materials from your governmental relations files, do we not?

A. Yes.

Q. But in the archives, there is still a considerable amount of material in your government relations files which have not been produced.

A. That is true. . . .

. . . .

Q. Have all the material that there is, have you produced for us to look at today?

A. Not all of it.

• • • •

Q. Do you have in your files a separate section of the files devoted to Teacher in Politics?

A. I have a few boxes of materials. Those have been examined.

Q. Are all of those materials that you have in your files produced for us to look at today?

A. Those were the material that were examined this morning, and the pertinent material are included there.

Q. But there are other materials in those files which have not been produced?

A. There are a few. • • •

Q. Well, there are other materials in your Teacher in Politics file which have not been made available to us for our inspection. Isn't that correct?

A. Well, those were examined this morning hurriedly. And at this point, I can't tell you what percentage of the collection is included here. I think—

Q. Will you go look?

MR. SELZER [counsel for defendants]: No.

BY MR. BRYANT:

Q. But there are other materials in that file which are not available for us to look at today, some other materials?

A. Well, if it is not on the table, it is on the shelf.

• • • •

A. I can't say it is all on the table or more is on the shelf, because I am not sure to the extent of the collection that you have here.

Q. Will you determine whether or not there is other material from that file on the shelves which has not been made available to us?

MR. SELZER: Let's go off the record.

(Discussion off the record.)

MR SELZER: The record should reflect that during the recess, Ms. Morton, myself and Ms. Hanna [i.e., NEA staff counsel] retreated to the archives and have produced the entire Teacher in Politics file post 1972 relevant and irrelevant of which we are aware. * * * Is that a fact, Ms. Morton?

THE WITNESS: That is the fact. * * *

And, at an earlier point in the deposition:

Q. * * * I had asked you to look again at paragraph 2 of the magistrate's order—

A. Yes.

Q. —and I indicated that I wanted you to search your files for the materials indicated in that paragraph. * * * I believe I recollect you making a statement concerning the length of time that you thought it would take you to search your files for those documents. How long do you think it would take?

* * *

THE WITNESS: I would want three months, at least.

* * *

Q. Do you have any objection if I or someone from my organization searched the files that you pointed out to your attorney?

MR. SELZER: I think we ought to make it clear at this point that Ms. Morton, in the course of any reasonable search for these materials, would be allowed to utilize the assistance of other people, and it is clear that upon my advice, she utilized my advice and during the afternoon, the assistance of Ms. Hanna to find materials. I think we should also bear in mind that with respect to discovery in this case, there is a deadline of December 31, 1978.

I think, given all of these perimeters, that under the circumstances and given the time involved, we have made a reasonable search for the documents that comply with the court order. It is also the only search that we are going to make, and if you desire to have something more than the effort that we have made, I would suggest you go back to see Magistrate Renner, and I would submit he is not going to be very sympathetic.

MR. BRYANT: I just would like to be clear, then, that as counsel for the defendant employee organizations, you are telling me that you will not produce any other documents other than the ones that are on the table at the present time. Is that correct?

MR. SELZER: That is correct. [239]

Thus, Morton admitted that defendants' counsel had not produced all the arguably relevant materials covered by Magistrate Renner's Order; and counsel themselves admitted as much by belatedly producing the complete "Teacher in Politics" file. Moreover, Morton indicated that a competent search would require three months, whereas defendants' counsel had spent only about one day "pull[ing] out some materials". Defendants' counsel, furthermore, refused to permit plaintiffs to perform a search—on the ground that discovery would terminate on 31 December 1978. What such a search, undertaken without the intermediation of defendants' counsel, would discover in the extensive NEA Archives is anyone's guess.

R. Dick Vander Woude

Q. [by Dr. Vieira, for plaintiffs] Now referring to the office that you keep in your home, do you maintain any files . . . of documents that might come into your possession with respect to your work?

. . . .

A. [Mr. Vander Woude] Well, it's a rather large metal file and I throw stuff in it.

Q. How large is the file?

A. Oh, three-tier, three-bay.

. . . .

A. Three-drawer with three things across. You know, pull out one drawer and there are three bays, another drawer, three bays, another drawer, three bays. [240]

What Vander Woude produced from this "rather large metal file", however, was only a handful of documents. [A-10 and A-11]

Gary Watts

Q. [by Dr. Vieira, for plaintiffs] With respect to the files in your office, approximately how much material do those files contain in terms of a file drawer limit, . . . two, three, four, five drawers full?

A. [Dr. Watts] No, there are eight or nine file cabinets.

Q. And those would contain all your external and internal correspondence?

A. I don't know. They probably do.

Q. There may be others?

A. I suppose. I don't file so I don't know. [241]

Of Watts' "eight or nine file cabinets" (which, if standard, contain thirty-two to thirty-six drawers), defendants produced the equivalent of only three file-drawers of materials—that is, roughly 10% of the amount available. (A-12, A-13, and A-14]

Evidently, as defendants' counsel Miller told this Court, someone has done a substantial amount of "plucking". That such "plucking", without notice or explanation to plaintiffs, flies in the face of Federal Rules 34 and 45 needs no emphasis, only corrective action.

D. DEFENDANTS HAVE WITHHELD CERTAIN SPECIFICALLY IDENTIFIED, AND AN UNKNOWN NUMBER OF OTHER, DOCUMENTS FROM PRODUCTION.

Only first-hand experience reviewing, page by page, the documents defendants have made available over the course of this case can adequately acquaint one with the practical significance of the "plucking" defendants have done. Only reading through document after document that refers to a missing attachment or to some report or other material inexplicably absent from the file can indicate the substantiality of non-production on defendants' part. But a sample from an affidavit of plaintiffs' counsel can offer some insight:

7. In examining the files produced on November 20, 1978, I discovered a number of indications that said files had been tampered with by the removal of documents. For example, I found file folder #119 in the Dunn files, labeled "Political Activity Rebate Procedure," turned in the opposite direction from the other file folders and containing only one sheet of paper. Also Dunn file folder #703, labeled "Government Relations," contained a memorandum from Stan McFarland to Margaret Stevenson concerning hiring a political consultant from Michael McClister Associ-

ates. Said memorandum's staple was sprung, which indicated that attachments had been removed. Furthermore, Harman file folder #123, label-"NEA-PAC," contained a single sheet which was torn in the corner, which indicated the removal of attachments. [A-7]

Deposition-testimony also provides numerous vignettes that graphically imply what has transpired in discovery to date:

Rosalyn Baker

Q. [by Dr. Vieira, for plaintiffs] Now, it also seems to me from reading the letter of December 6 [i.e., Baker Deposition Exhibit No. 32], that there was supposed to be something else in this report * * *, to wit, some descriptive material with respect to how the campaign worked, what teachers did and so forth and so on.

Was such a report in fact received by you?

A. [Mrs. Baker] I thought it was, although it could have been over the telephone.

Q. You don't know any reason, do you, why that report was not produced for us today?

A. The only reason it wouldn't have been produced, is if it had been inadvertently thrown out of the files and it just wasn't there.

There would be no sinister reason why it wouldn't be produced.

* * * *

Q. You didn't have any part, did you, in collecting the documents that were produced today?

A. No.

Q. Then you really—

A. I really don't know why it wasn't. . . .

I really don't know.

Again:

Q. In the last full paragraph on the first page of the letter of December 7 [i.e., Baker Deposition Exhibit No. 33], you refer here to a report regarding how funds were spent, impact on the campaign, role of teachers so forth and so on.

You don't know any reason, do you, why a report on the impact of the campaign and role of teachers and the like were not produced for us?

A. No.

Again:

Q. . . . with respect to the other two aspects of the information that is requested . . . in the front of Exhibit 34, that is, the impact on the campaign, role of teachers and so forth and so on?

A. Most of it came verbally over the phone or through some newspaper clippings. If there was that sort of report, it was either in the files or for some reason didn't get copied or got thrown out.

There would have been no reason why, if it was there, you wouldn't have gotten a copy of it.

Q. But you have no knowledge as to what happened to it or if it was there, why it wasn't copied?

A. No.

Again:

Q. What kind of report did you prepare . . . ?

A. * * * I just would have had to have done a report for the executive committee since it was their authorization, their expenditure. * * *

Q. Do you recall in general doing that? * * *

A. Yes.

* * *

Q. If today, you wanted to find the report you wrote * * * where * * * would you look for it * * *?

A. Well, probably start with my ERA files which is where these [i.e., other deposition exhibits] were * * *.

Q. Where are your ERA files?

Are those in the file cabinets you keep in your office?

A. Yes.

Q. If you didn't find it there—

A. If you don't find it there, I would have figured I would have struck out because if I don't have it, I don't imagine anybody does. [242]

Robert Harman

Q. [by Dr. Vieira, for plaintiffs] Do you recall whether or not you retained * * * a copy of the kit connected with the Carter-Mondale contact program sent out to UniServ people in 1976?

A. [Mr. Harman] Yes.

Q. Including the instruction sheet that went along with it?

A. I think I have a full set of material.

Q. Do you know why that material was not produced for our inspection and copying in this case?

A. No. [243]

Susan Lowell

Q. [by Dr. Vieira, for plaintiffs] How about the kit that was sent to the Uni-Serv staff people that dealt with the get-out-the-vote telephone drive?

A. [Mrs. Lowell] * * * I don't know if they are still around.

MR. VIEIRA: I would like to make a request on the record to see if you people could come up with those two kits and bring them for us tomorrow, if they still exist. Because I would like to have Mrs. Lowell identify them since the only other witness we have scheduled is Harris, who left the ship before it sailed on the Carter-Mondale voyage.

MR. GOODWIN [counsel for defendants]: I am not spending time between now and tomorrow looking for kits. If you want to make a formal request.

MR. VIEIRA: I just did.

MR. GOODWIN: Not through deposition.

By MR. VIEIRA:

Q. How would you go about finding the thing if you wanted to, Mrs. Lowell?

A. I think that is a process we will discuss with the attorneys.

Q. Why don't you discuss it with us since Mr. Goodwin says we have to make a formal request.

A. The process will have to be looking for it.

Q. Searching randomly?

MR. GOODWIN: She doesn't know where it is. [244]

Stanley McFarland

Q. [by Dr. Vieira, for plaintiffs] * * * Does your office make such reports to Mr. Dunn?

A. [Mr. McFarland] Yes.

* * *

Q. Do you have a record of those reports to Mr. Dunn? * * *

A. I am sure we have.

Q. Why wasn't it produced for us?

MR. MILLER [counsel for defendants]: I don't think Mr. McFarland can answer that.

By DR. VIEIRA:

Q. He can say he doesn't know.

A. I don't know.

Again:

Q. * * * Did NEA establish a plan to translate its commitment to the Equal Rights Amendment to specific action?

A. Yes.

Q. Who did that?

A. My office.

* * *

Q. Was a copy of this plan retained in the files of the Government Relations Office?

A. I doubt it. We did a draft and it was sent up. Many times we don't keep drafts.

I don't know. If it is in the file, it is in the file.

Q. It was a communication from you to Mr. Herndon [i.e., NEA Executive Director]?

A. Yes.

Q. Were you aware of the existence of this plan prior to coming to the deposition today?

A. Certainly.

Q. Do you have any idea why this plan wasn't produced for us?

A. I have no idea.

Again:

Q. Can you give me any explanation * * * why, from 1970 * * * to today, this [i.e., McFarland Deposition Exhibit No. 8] is the only letter in your correspondence file with respect to the implementation of any new business item that you sent to a state affiliate?

A. I don't have any idea whether it is the only letter or not in my files. * * *

Q. * * * Is this the only letter to your knowledge that you have ever sent out since 1970?

A. I am sure there has to be others.

Q. Do you have any explanation as to why others were not produced today?

A. No.

Again:

Q. Do you maintain copies of * * * your reports to Herndon?

A. Possibly.

I really, frankly don't know.

It goes from my office. Whether we keep a copy of it, I don't know.

Q. Do you have any idea . . . why copies of those reports of implementation of resolutions and new business items were not produced for us today?

A. I have no idea.

Again:

Q. Mr. McFarland, you said on some occasions you receive requests from United States Congressmen to which you respond by sending them the legislative report card.

How much of this kind of correspondence do you get?

A. I really can't answer your question because I don't necessarily handle it. . . .

Q. Do you know any reason why in the documents produced to us we haven't seen any of these requests from Congress?

A. I don't know why.

Again:

Q. Reports of the kind that are attached here were filled out and sent back?

A. We received some, yes.

Q. Where are those filed?

A. I have no idea.

Q. They came to the Government Relations office?

A. Yes.

Q. Do you know any reason why they weren't produced for us . . . ?

A. I have no idea.

Again:

Q. It talks on the first page of Exhibit 14 . . .
about this kit of materials to be used.

. . . .

Q. Who produced this kit?

A. NEA. I assume we did.

Q. Government Relations?

A. Yes.

Q. Do you know any reason why this kit was not
produced for us?

A. No.

Again:

Q. Do you know what happened to these plans . . .
from the states that submitted?

. . . .

A. No.

Q. Did Mr. Harman . . . ever make a compilation
. . . of what the activities, that is, the states that had
plans . . . were intending to do?

A. In all likelihood there was a list, yes.

Q. Did you ever see that list?

A. I probably did, but I don't specifically remember
it.

Q. Do you remember where it is now?

A. No.

Q. Do you have any idea why these plans and this
list were not produced for us today?

A. No, I have no idea.

Again:

A. It [i.e., McFarland Deposition Exhibit No. 31] is a TWX from myself to State GR Directors * * *.

* * *

A. * * * It is a strange assortment of states * * *.

Q. Could it be that you sent an earlier TWX? You say, "See my TWX of September 16 for details". * * *

A. I have no memory. If you have the September 16th TWX maybe that can explain it.

Q. It is strange, sir, the September TWX didn't appear in your correspondence file.

* * *

Q. * * * do you have any explanation why the TWX of September 16 was not produced for us?

A. I have no explanation.

Again:

Q. Was there any report that came out of it?

A. The results.

* * *

Q. Were the summations or results of this polling made available to you?

A. Yes.

Q. Do you know any reason why it wasn't produced for us, any of them?

A. I have no idea.

Again:

Q. [McFarland Deposition Exhibit No. 41] refers to something called Terry Herndon's memo concerning the Senate Select Committee.

What was that memo about?

A. I don't remember specifically. I don't remember.

Q. Could it have been that Mr. Herndon's memo was seeking responses from politically active individuals in the NEA with respect to problems that might arise from investigation by the Senate Select Committee?

A. That could be pure speculation on my part. I just do not remember specifically. I would like to see the memo.

Q. Was this memo ever communicated to you?

A. I am sure it was.

Q. Do you know of any reason why it wasn't produced for this deposition?

A. No, I don't, except it probably wasn't in my correspondence files.

Q. You mean the file kept behind your secretary's desk?

A. It may not even be in the file in the office. It may be one I threw away.

Again:

Q. Was there a report or summary of this information prepared for presentation to yourself or Mr. Herndon or others?

A. I think we came up, probably with some round numbers, and offhand, I don't remember what they were nor who they were given to or whether they were just used with the press.

Q. Do you know any reason why the reports or analyses that were done or received within the Government Relations Department with respect to this matter of teacher volunteers participating in the Carter-Mondale campaign didn't appear in the materials produced for us?

A. I have no idea. I don't even know whether this stuff was kept, like a lot of other things.

Again:

Q. Were there prepared for this program special materials to be used?

A. Yes.

Q. And agendas, explanations of what the trainees were to go through?

A. Stacks of materials like this.

MR. MULLIN [counsel for plaintiffs]: Let the record show that the witness indicated a stack of materials about three feet high.

By MR. VIEIRA:

Q. Are you aware of where these materials are today, or a copy of the program documents of this conference * * *.

A. Somewhere in my office * * *.

Q. Do you have any idea why they weren't produced for us today?

A. I have no idea.

Again:

Q. That sounds like a fair amount of paper that is generated.

Where are all the materials connected with your activities being stored?

A. In my office.

Q. Will you explain to me then why none of them were produced for this deposition?

A. Because some of them weren't produced until several weeks ago * * *.

Q. How many weeks ago?

A. Within the last two weeks.

Again:

Q. Does that refresh your recollection as to what Rosalyn Hester did * * * in the Target 72 program?

A. Yes, she worked with * * * state locals or anyone else to work on voter registration programs. * * *

Q. You say in this memorandum [i.e., McFarland Deposition Exhibit No. 70] * * * "attached is information to bring you up to date on other organizational efforts regarding voter registration."

Do you recall what sort of materials were attached to this memorandum?

A. I don't remember.

Q. Do you have any explanation why those materials were not produced, although we have the cover memorandum?

A. I don't know.

Maybe it is a lousy filing system. [245]

Alice Morton

Some background information is necessary to understand the situation here. In a 1974 letter, Rosalyn Baker described a UTP activity called "Project 18" which "worked with a coalition of other national organizations, the Youth Franchise Coalition". Project 18 and the Youth Franchise Coalition were the predicates for turning out the "youth" vote on behalf of the McGovern-Shriver presidential ticket in 1972. [246] In a 1975 letter, Baker wrote that "[a]ll files and materials [relating to the Youth Franchise Coalition] were given to the NEA Archives for future research use". [247]

In connexion with the Morton deposition, however, defendants produced no materials concerning Project 18, the Youth Franchise Coalition, or any matters related thereto. Neither did they produce any materials relating to voter-registration efforts of any kind:

Q. [by Mr. Bryant, for plaintiffs] To your knowledge, do you have a file in the archives related to "Target '72"?

A. [Ms. Morton] Not in a box labeled with that title, no. . . .

Q. Do you have in your files material related to a voter registration drive in the national elections for 1972?

. . . .

A. Nothing more than what is in published materials like the reporter [i.e., the NEA newspaper] or in the news releases which you are already familiar with.

BY MR. BRYANT:

Q. How about files related to a voter registration drive for 1973?

A. The same answer would apply.

Q. A voter registration drive for 1974, 1975, 1976, 1977 and 1978?

A. Any voter registration drive, I do not keep any collected materials categorized as such. Some of this information may appear in the various publications, but there is no attempt to isolate these campaigns and file them as such. [248]"

"Such testimony further substantiates the need for this Court to permit plaintiffs direct access to the NEA Archives.

Gary Watts

Q. [by Dr. Vieira, for plaintiffs] * * * Since 1975, have you had Associate Directors preparing monthly reports for you?

A. [Dr. Watts] Yes. They are not always monthly, but they prepare reports, yes.

* * *

Q. Who keeps these reports in your office?

Whose responsibility is it to maintain these records?

A. They are filed.

Q. They might be in the nine file cabinets you have in your office?

A. Undoubtedly they are. [249]

Defendants have yet to produce a single copy of such reports, in connexion with the Watts deposition or otherwise.

A further glaring example of how defendants have withheld specifically identified documents also highlights the "game-playing" attitude with which they have approached discovery in this case. In the deposition of NEA President John Ryor appears the following passage:

Q. [by Dr. Vieira, for plaintiffs] Now as far as the teachers who volunteer for political action, is there any supervision by NEA or local, state affiliates of how they participate in political actions?

A. [Mr. Ryor] There is no supervision on the part of NEA. I cannot speak for the other levels.

Q. * * * There would be no reports or memoranda that you would have seen that would describe the levels of teacher involvement to [or?] where they were involved?

A. No, I wouldn't say that. The Reporter memoranda would more likely be an assessment through state government relations divisions which in turn called local organization leaders to make some sort of evaluation * * * of how many teachers were involved and how many hours were spent.

Q. And information of that sort would then be communicated by the state affiliates to the national organization?

A. Yes, that would not be uncommon, right. [250]

Note that the question of plaintiffs' counsel spoke in terms of "reports or memoranda"; but the stenographer erroneously recorded Ryor's answer in terms of the "Reporter memoranda" (a not unlikely transcription of "report or memoranda" spoken quickly). Anyone reading the transcript carefully, however, can see that plaintiffs' counsel meant "reports or memoranda" as synonymous terms—and that Ryor's answer makes sense only taken *in pari materia*.

When plaintiffs requested defendants to produce the "reports or memoranda" to which Ryor referred as emanating from state and local UTP affiliates [251], though, defendants produced, not a report or a memorandum, but a copy of a single issue of the UTP national-level newspaper, the *NEA Reporter* [252].

Now, defendants are aware that there is no such thing as a "Reporter memoranda"; the *NEA Reporter* is a newspaper, not a compilation of memoranda. But their absurd construction of the obvious (and trivial) transcription-error in Ryor's deposition served to rationalize their continued withholding of the analyses of the level of involvement of UTP members in candidates' campaigns that

plaintiffs have long sought to discover.⁴⁴ In such wise do defendants demonstrate their "good faith" in document-discovery.

In sum, defendants have withheld document after specific document—in the course of production connected with the depositions of their staff-personnel; in the course of production ordered by Magistrate Renner; and in the course of their responses to other of plaintiffs' requests under Federal Rule 34. The number of unknown, but relevant, documents the existence of which they also have been able to conceal because of these activities must be immense.⁴⁵

E. DEFENDANTS HAVE DESTROYED, OR ARE IN THE PROCESS OF DESTROYING, DOCUMENTS THAT POST-DATE THE FILING OF PLAINTIFFS' COMPLAINT

Perhaps most serious of all, the record indicates that defendants have destroyed, or even now may be destroying, relevant documents produced *after* plaintiffs filed their Complaint in December, 1974.

For example, one of plaintiffs' counsel relates the following conversations with persons working under the direction of defendants' counsel during the production of NEA-GRD Assistant Director Robert Harman's "correspondence-file":

⁴⁴ For further examples of defendants' determination to withhold this information from plaintiffs, see Part IV.C., *infra* pp. 297-313.

⁴⁵ The most valuable source of information disclosing the existence of relevant materials in this case has consistently been other materials, often themselves innocuous, that contain references of one sort or another to the documents plaintiffs need. This provides further support for an Order from the Court granting plaintiffs direct access to the UTP files. The very size of these files precludes the possibility that defendants will be able to expurgate every reference to the campaign-activities of their organization that lie at the heart of this case.

4. The person who produced the * * * documents identified himself as Andy Newman, who I later learned was working under the direction of Faith Hanna, NEA staff attorney. At the time * * * I asked Mr. Newman why there were no other documents for Robert E. Harman, and he answered by stating: "I was asked to go through two file drawers and that's what I did."

5. Upon examination of Harman's documents on November 20, 1978, I ascertained that the chronological correspondence-file contained no documents which were dated prior to August 1976. Harman's various subject matter files did contain some documents which were of pre-August 1976 origin.

6. During the same day * * *, one Gerry Moore, who identified herself as secretary to Faith Hanna, * * * came into the room * * *. * * * I asked Ms. Moore for an explanation regarding the reason for the lack of any pre-August 1976 documents in Harman's correspondence-file. Ms. Moore stated that the pre-August 1976 Harman files "have been destroyed—for whatever reasons." Ms. Moore then hesitated and stated something to the effect, "I mean, I guess they don't have room for them" and also stated, "they only keep things in Harman's office for about four (4) years." [A-7] "

Defendants' counsel Mr. Miller has also represented to plaintiffs in response to a request for production of docu-

"The production of documents for Harman was typical of that for the other NEA staff-persons: viz., chronological files of correspondence together with subject-matter files. That defendants produced these "mixed" files, and not simply chronological letter-files, is a further indication that they were well aware of the correct construction of the operative term "correspondence-file" as used by plaintiffs.

ments that "Mr. McFarland's correspondence files only exist for the period 1976 to the present" [253], leaving unanswered the question under what authority defendants destroyed arguably relevant documents during the pendency of this litigation.

NEA-GRD Director Stanley McFarland has also indicated that defendants may have destroyed pertinent UTP materials without notice to plaintiffs or this Court:

Q. [by Dr. Vieira, for plaintiffs] Do you know any reason why those reports or compilations, summaries or evaluations were not produced for us?

A. [Mr. McFarland] They were probably destroyed.

Q. They were destroyed, too?

A. I am sure—why should we keep them? . . .

. . . .

Q. It is your judgment that you would have destroyed, you being the Government Relations Department, would have destroyed all these UniServ directors' reports?

A. Can't see any reason why we would keep them.
[254]

Evidently, absent immediate intervention by this Court, defendants may make impossible the preparation of the record to which plaintiffs are entitled under the Federal Rules.

IV. Several of Defendants' Staff-Personnel Have Testified Untruthfully and Incompletely Regarding the United Teaching Profession's Involvement in Campaigns of Candidates for Election to Public Office.

Not only have defendants refused to admit or to stipulate to their substantial involvement in partisan politics, and not only have they withheld documents from produc-

tion without legal excuse, but also several of their staff-personnel, called as deponents by plaintiffs, have testified untruthfully or incompletely with respect to the UTP's involvement in political activism.⁸⁷ Such testimony has proliferated especially with regard to the crucial issues of the UTP's role in the 1976 Carter-Mondale campaign, discussed in Part IV.A., *infra* pp. 193-247; the participation of UTP staff-personnel as so-called "election pros" in candidates' campaigns, discussed in Part IV.B., *infra* pp. 247-97; the nature and level of involvement of UTP members as campaign-workers throughout the country, discussed in Part IV.C., *infra* pp. 297-313; and the operations of the MEA-GRC's 1340 Club/Committee and the IMPACE, discussed in Part IV.D., *infra* pp. 313-23.

This false and truncated testimony, where not-incredible on its face, has distorted and confused the record, complicated plaintiffs' search for material evidence of UTP activity in electoral campaigns, and (absent corrective action by this Court) set the stage for a protracted trial.

A. WITH REGARD TO THE 1976 CARTER-MONDALE CAMPAIGN, CERTAIN OF DEFENDANTS' STAFF-PERSONNEL HAVE NOT TOLD THE WHOLE TRUTH ABOUT THE UNITED TEACHING PROFESSION'S ELECTORAL PLANS, THE ACTIVITIES OF ITS EMPLOYEES AND MEMBERS, AND THE EXTENT OF THEIR INVOLVEMENT.

That at least twenty-two months before the 1976 general elections the NEA-GRD prepared a plan for mobilizing large numbers of UTP members throughout the United

⁸⁷ Plaintiffs do not assert that the record necessarily implies perjury or subornation of perjury under federal or Minnesota law. They need not, and do not claim to, establish here the basis in fact for a conviction, or even an indictment, of any of the deponents named in this Memorandum. Their sole purpose is to demonstrate that the testimony in this case is sufficiently tainted and questionable to warrant this Court in extending discovery and in imposing sanctions against defendants.

States for campaign-activity in support of a presidential candidate, and for coordinating the activity of those members with the candidate's campaign-staff, is a matter of public record."²² That the UTP claimed extensive involvement of its members in the 1976 Carter-Mondale campaign is also a matter of record:

NEA teachers and college faculty around the nation showed their political power this fall by helping to elect the Carter-Mondale ticket * * * .

* * * *

²² The plan provides as follows:

4. *Mobilize organization forces to elect the endorsed Presidential candidate*

Organizational energies will be focused at the grassroots level to maximize the number of teacher supporters for the candidate, generate teacher volunteers, and maximize teacher turnout on election day. For purposes of persuasion (to vote for the endorsed candidate) and get-out-the-vote activities, teacher also includes spouse and voting age family members.

A full-time coordinator of teacher support activities will be identified in each state to work with the party leadership and state campaign staff of the endorsed candidate. The coordinator should be selected after both party nominees are selected but prior to completion of the endorsement process so that the staff person can become familiar with other NEA political activities in the state, positions of potential endorsees, and in general become familiar with and begin planning for support activities. The coordinators will be drawn from state and UNISERV staff ranks.

Teacher support activities for the endorsed candidate will be varied. The type of activity undertaken by NEA on behalf of the candidate will be determined by GR staff in consultation with the candidate's campaign manager. For instance, NEA has a wealth of talent among its staff that could be useful to a Presidential campaign if the campaign needs such services during the final month and a half. NEA in conjunction with NEA-PAC could make these services available to the campaign if requested to do so. One definite activity will be to inform every member of the NEA endorsement and the candidate's pro-education positions and other high qualifications. All NEA-authorized activities will be in compliance with the 1971 Federal Election Campaign Act as amended. [2, p. 141]

Following the NEA endorsement, teachers across the country worked in all aspects of the campaign—acting as campaign coordinators, running phone banks, stuffing envelopes, and speaking on behalf of candidates. [255]

And that a top Carter-Mondale campaign staff-man praised the UTP for its assistance is a matter of notoriety, too:

Carter Campaign Director Hamilton Jordan declares that “the massive support from teachers was critical in our winning this very close election. All over the nation we turned to the NEA for assistance. We asked for their help, and they delivered.” [256]

None the less, in their testimony several UTP staff-persons from the national and state levels denied the existence of, or equivocated about, plans for involving the organization’s members in the Carter-Mondale campaign; falsely or incompletely described the electoral activities of the UTP; and generally pleaded ignorance as to the level of involvement of UTP staff-personnel and members on behalf of the Carter-Mondale ticket.

1. *Certain of defendants’ staff-personnel have testified falsely or incompletely concerning the existence and nature of plans for United-Teaching-Profession involvement in the 1976 Carter-Mondale campaign.*

With regard to the existence and content of plans for mobilizing UTP members as campaign-workers in support of a presidential candidate in 1976, the testimony of the UTP staff-personnel deposed by plaintiffs is a study in falsehood, evasion, obfuscation, and equivocation.

The Shotts thesis establishes that the NEA-GRD began planning for the mobilization of UTP staff-personnel and members as campaign-workers in the 1976 presidential election at some time prior to 13 January 1975. [2, p. 141]

Nevertheless, NEA President James Harris testified he knew nothing about it:

Q. [by Dr. Vieira, for plaintiffs] Isn't it true that in . . . late 1974 going into 1975, that the people in Governmental Relations were actually talking about a plan that involved identifying a full-time coordinator of teacher activities in every state who they hoped would be able to work with the parties' leadership and campaign staff of whatever candidate was endorsed in 1976?

A. [Mr. Harris] I don't know about that plan.

MR. GOODWIN [counsel for defendants]: Time for a break.

THE WITNESS: I am sure that didn't occur during the time I was involved.

MR. GOODWIN: We are taking a break. We are going to have a short recess.

(Brief recess.)

By MR. VIEIRA:

Q. So it was your testimony, sir, that while you were NEA President in 1974 to 1975 you never saw a document that came out of the Governmental Relations Department that discussed the possibility or desirability of having coordinators of teacher volunteers appointed in each state, working with party leaders and campaign staff people in the candidate's office who was endorsed for president in 1976?

MR. GOODWIN: Object. It is repetitions. He has answered. He doesn't recall that document. If you want to show him the document, it might refresh his memory.

THE WITNESS: I am not saying I never saw one. I don't remember ever seeing one and don't remember the details of one. [257] "

" Mr. Goodwin's demand that plaintiffs' counsel show the witness a document to "refresh his memory" is not an isolated example. One of the devices defendants have employed throughout the course of discovery has been the "selective memory", the memory that functions only when the witness is confronted with a document the contents of which more or less compel him to testify truthfully and completely. Thus, when asked a question without having the document provided, the witness can say (untruthfully): "I don't remember." And then, when the document is presented, the witness can protect himself by claiming: "Now I remember."

The "selective memory", of course, is only as effective as the defendants' production of documents is sparse—which in part explains the machinations detailed in Part III., *supra* pp. 143-92. It also required defendants to be constantly on guard against documents plaintiffs acquired from sources other than defendants or their agents—which perhaps explains Mr. Goodwin's manifest concern, in the Harris deposition, that plaintiffs' counsel was forming questions on the basis of a document he declined to show to the witness:

BY MR. VIEIRA: Mr. Harris, going back to early 1975, do you recall seeing a document that came out of the Governmental relations office that is entitled plan or program, whatever, dealing with the NEA presidential endorsement procedure?

A. [Mr. Harris] At the moment I don't recall seeing it. If there was a copy, I might. Then I might recall seeing it or be able to remember it if I could see such.

* * *

Q. Was one of the plans you developed in connection with the activity that you hoped would take place in 1976 with respect to the endorsement and election of presidential candidates that year, to mobilize forces in the United Teaching Profession to try and influence as much as possible the decision of the Democratic and Republican national conventions in 1976?

MR. GOODWIN [counsel for defendants]: Object to the question as being vague and undefined and incapable of being

Besides Harris, others pleaded ignorance of a comprehensive UTP Plan. NEA-GRD Director Stanley McFarland testified that "all the way through there was never a master plan developed in writing that would span either a year or two years in terms of the Presidential opera-

answered specifically because of terms which are not defined and have not been defined, such as mobilize and influence.

MR. VIEIRA: You mean terms used in the NEA document?

MR. GOODWIN: If you want to show us the NEA document—

MR. VIEIRA: No. You are not going to see this document. This is going into the court, along with a number of others. We won't bother to show you everything we have. We will let you sink deeper and deeper into the quicksand.

MR. GOODWIN: So I understand—you are reading from a document and asking questions about the document and you are unwilling to show the document to the witness. Is that correct?

MR. VIEIRA: No. It is not correct. I don't intend to answer any more questions.

.

Q. You don't recall . . . ever seeing written material that purported to set out an outline, or guidelines or program statement . . . ?

MR. GOODWIN. He has said he doesn't recall any plan or program, and in the absence of looking at the document you have refused to provide him, it is repetitious and harassment of the witness, and I instruct the witness not to answer. [258]

Other examples of the "I-need-a-document-to-tell-the-truth" ploy appear in the McFarland deposition:

A. [Mr. McFarland] You are saying it is June or July. My memory isn't that good.

You may have a document. I don't have a document.

Again:

A. I have no memory. If you have the September 16th TWX maybe that can explain it.

Again:

A. That could pure speculation on my part [sic]. I just do not remember specifically. I would like to see the memo.

tion". [260] Yet a "master plan", of course, is precisely what the document in the Shotts thesis is: an overview or outline of a program to implement every aspect of the UTP presidential-endorsement/election procedure over a period of twenty-two months.

McFarland did admit that a plan, or "time line" as he called it,⁹⁰ was drawn up in the Fall of 1975. [261] But he

Q. [by Dr. Vieira, for plaintiffs] Was this memo ever communicated to you?

A. I am sure it was.

Q. Do you know of any reason why it wasn't produced for this deposition?

A. No, I don't * * *. [259]

In any event, defendants' apparent use of the tactic of "selective memory" provides grounds for plaintiffs' request that they be allowed to inspect certain UTP files without the meddlesome intermediation of defendants or their agents. *See* Part V.B.1., *infra* pp. 326-27.

⁹⁰ Defendants' use of jargon, double-talk, and peculiar meanings for everyday terms has plagued discovery in this case. For example, in the McFarland testimony discussed in the text, the following colloquy appears:

Q. [by Dr. Vieira, for plaintiffs] * * * I find it very difficult to believe that at no period of time did someone sit down and draw up the simplest outline of what you hoped or anticipated * * * you were going to do.

A. [Mr. McFarland] Certainly, there was a time line.

Q. That's what I mean by plan. You had a time line.

A. It is a time line.

Q. Sometimes to me a plan is a plan. We live in different worlds.

Perhaps if plaintiffs had not discovered the penchant of defendants for "time lines" instead of "plans", they would know even less than they now do about the UTP's "time lines" for the Carter-Mondale campaign. What other information material to this case have defendants concealed behind doors of forgetfulness that only the "Open, Sesame!" of some trick-word or -phrase can swing aside?

contradicted himself as to its content, testifying at one point that the plan involved activities directed towards recruiting UTP members to become campaign-workers[262], and at another point that it did not [263]. At still another point, he testified that planning for electoral politics began only in the Summer of 1976:

Q. [by Dr. Vieira, for plaintiffs] When, if at any time, did you begin working on a plan strategy, tactics respecting NEA involvement in the actual candidates' election?

That is, involvement of NEA members in the election process * * *

. . . .

A. [Mr. McFarland] Well, after the NEA convention, when the procedure was finally determined, * * * we started planning materials of what we needed to get out to the membership * * *.

Q. So the planning with respect to the election of the Presidential candidate to that office began sometime around the Summer of 1976?

A. That's correct.

Q. June-July, somewhere in there?

A. Yes * * *. [264]

Yet, at still another point in his testimony, after being confronted with a document, McFarland admitted that, as early as May 1976, UTP staff-personnel were writing memoranda and conducting discussions concerning electoral activities of the organization's members:

Q. [by Dr. Vieira, for plaintiffs] I show you * * * McFarland Deposition Exhibit Number 35 * * *

A. [Mr. McFarland] It is a memo from Vaughn Baker, Rosalyn Baker, to Robert E. Harman dated May 26, 1976.

. . . .

Q. Have you ever seen this thing before, sir?

A. On or about the date Harman received it, May 26, or shortly thereafter.

Q. Did Harman show this to you?

A. Yes.

. . . .

Q. What did he say he was going to do with this?

A. We discussed—

Q. And the substance of the discussion was what?

A. They make certain recommendations here in terms of a number of categories that are listed, educating membership, recruiting volunteers, get out the vote [265]

McFarland also admitted that the state and national levels of the UTP cooperated in planning for the involvement of UTP members in the Carter-Mondale campaign; but his knowledge of what that planning entailed substantively was remarkably scanty:

Q. [by Dr. Vieira, for plaintiffs] Isn't it true that some time in the middle of 1976, June or July, that high officials, staff people of the NEA actually requested all of the state affiliates to develop a plan that was going to be used by NEA thereafter to form the basis for the development of an overall campaign strategy to elect the NEA-endorsed candidate?

A. [Mr. McFarland] Yes.

. . . .

I don't remember particularly offhand, but I don't think we received more than maybe 15 or 20 plans from the 50 states. I can't pin that down.

Q. What happened to those plans?

A. I have no idea. [266]

McFarland's subordinate, Assistant Director Robert Harman, also remembered the solicitation of state-level plans, but not their utilization:

Q. [by Dr. Vieira, for plaintiffs] * * * What I am interested in discovering is whether sometime subsequent to 1 June 1976 there appeared in NEA Governmental Relations offices certain plans * * * from state affiliates * * * with respect to what might be done to help elect the presidential endorsee?

A. [Mr. Harman] * * * [W]e may have had a response from some states. * * * I can't recall the states.

Q. Can you recall what was done with the responses that were received?

A. No.

Q. Do you know who was in charge of looking at those responses as they came in?

A. Not as a certainty. I just don't remember.

. . . .

Q. Between the 1st of June '76 and the election in November that year, did you ever become aware that someone in the Governmental Relations Department of NEA had prepared plans * * * that suggested a way that NEA and state and local affiliates could cooperate to aid the election of Mr. Carter and Mondale?

A. I don't recall such a thing. [267]

Harman's lack of knowledge stands out strikingly in view of McFarland's identification of Harman as the man in charge of the whole affair of state-level election-plans:

Q. [by Dr. Vieira, for plaintiffs] * * * Do you recall any of the states from which you received these plans?

A. [Mr. McFarland] No.

Q. To whom were these plans submitted in terms of the person who was to be responsible for actually looking at them, seeing what they contained * * * ?

A. I believe Bob Harman did. I don't believe I even looked at them.

Q. Did Mr. Harman ever come back to you and tell you anything about these plans?

A. That we only have a few.

Q. And then, as a result of only having a few, what was the outcome?

A. Those plans that we received we dealt with the state that submitted it on an individual basis.

Q. And where you hadn't received a plan that state swam on its own?

A. No, we went back and tried to ascertain where they were and where they were going to be.

Q. Who was responsible for ascertaining that information?

A. Bob Harman.

* * * *

Q. Did Mr. Harman or anyone else to your knowledge ever make a compilation, a study or analysis that was put down in one place, a summary of what the

activities, that is, the states that had plans, had submitted plans were intending to do?

A. In all likelihood there was a list, yes.

Q. Did you ever see that list?

A. I probably did, but I don't specifically remember it.

. . . .

Q. With respect to those states that did submit a plan, you said you worked with them individually, then the follow up with those states was along the lines that you discussed with us previously through the Government Relations Regional men as the contacts?

A. Yes.

Q. Did those individuals report back from time to time as to the extent of activity in these cooperating states . . . ?

A. Yes.

Q. Mr. Harman came to you?

A. Yes.

Q. What did he tell you was going on in terms of those states?

A. There is a lot of state X or Y. There is little going on. We still don't have a state plan. I have no memory, I cannot remember the specifics of that at this time. [268]

So, in short, the NEA-GRD requested all the state-level UTP affiliates to prepare plans for the involvement of UTP members in the 1976 presidential election; many of the affiliates did so; yet, notwithstanding this, neither McFarland, NEA-GRD Director, nor his chief subordinate, Harman, the man responsible for coordinating the activity, knows anything substantive about it.

Revealingly, MEA-GRC Chairman J. M. Sokup was not so ignorant of the nature of the planning:

Q. [by Dr. Vieira, for plaintiffs] At this political action conference at St. Scholastica [College, Minnesota, in June 1976] were the trainees * * * informed that NEA was devising or had devised a plan with the aid of its state affiliates whereby state affiliates would attempt to coordinate campaign activities of teacher volunteers in the presidential campaign of whomever was endorsed by the NEA with the campaigns of congressional candidates that year?

A. [Mr. Sokup] Yes.

Q. Who communicated that information?

A. That information would have gone to Mr. Mamenga [Director of the MEA-GRD]. * * *

Q. But you do remember something from the NEA that talked about a coordinated effort in terms of presidential and congressional campaigns?

A. I don't remember a specific document. I remember that NEA was looking to that end. [269]

That a plan coordinating national- and state-level activities of the UTP in support of the Carter-Mondale candidacy was produced, plaintiffs infer from Harman's obfuscatory testimony concerning a meeting held at UTP national headquarters on 23 September 1976.

Q. [by Dr. Vieira, for plaintiffs] * * * did you request government relations contacts from all the states to appear at this meeting?

A. [Mr. Harman] Yes.

Q. Approximately how many states were represented?

A. Somewhere between 20 and 30 I suppose.

* * *

Q. Why did you consider it important to request all these people from the state affiliates all over the United States to assemble in Washington in September of 1976 * * * ?

A. Well, at that time there were or would have been two concerns: One, we were moving into the first presidential endorsement ever and the state affiliates were not aware of the materials NEA was producing at the national level and their intended distribution of them, and we would not have believed the mail was a satisfactory way of communicating and talking with them about that. * * *

Q. * * * you didn't believe the mail was a satisfactory way to communicate with the various state associations about the activities that NEA was planning with respect to the Carter-Mondale candidacy, * * * the distribution of posters and peanut pins. Is that right, sir?

Q. There were buttons, two kinds of posters, new peanut pins, and the membership contact program.

A. Yes.

Q. That was the sum of NEA activity on behalf of Carter-Mondale in Washington?

A. No. They were distributing all promotional material produced from the state and local affiliates. The affiliates would have discussed the sample stories, background material that the state or locals could use for their own promotions.

Q. In order to show the people these materials and discuss with them their possible use, you felt it was necessary to call them all to Washington?

A. In part. Remember again time was a factor, and the distribution we had decided on of the material was directed to UniServ Units.

Q. You didn't call the UniServ directors to Washington, did you; the people who were going to——

A. No.

Q. If they didn't come to Washington, how were they informed of their central role in this activity?

A. Through the mail.

Q. So it was sufficient to have the central actors in the Carter-Mondale activity covered by the mail, but these peripheral people had to come to Washington in person?

A. They were not peripheral at all.

Q. What was their role in the Carter-Mondale contact program that required their coming to Washington?

A. We had asked them to encourage UniServ units locally to use those materials. Our experience was when we asked UniServ people to do something directly, our state government relations people got very much out of joint, so, in part, the meeting was to explain why we believed it to be necessary to make the distribution in that manner and continue in a face-to-face way to seek their support for doing it rather than relying on the mail.

Q. Who paid for their transportation to Washington?

A. My recollection is that they did.

Q. You asked these people to pick up the tab for the trip to Washington so you could convince them you were not going behind their back to discuss the Carter-Mondale program?

A. I don't agree with your characterization of that.

.

Q. Well, is that a correct description?

A. The one I just gave you. [270]

To appreciate the Byzantine nature of this testimony, one must consider several things: First, in general the role of so-called "governmental-relations" staff-personnel in the UTP's state affiliates does not involve public-relations activities.⁹¹ And, for that reason, it is highly unlikely that these people were summoned to Washington, as Harman claimed, to see "promotional material" on the Carter-Mondale candidacy, or to "discus[s] the sample stories, background material that the state or locals could use for their own promotions". The logical people to involve in discussions of this kind would have been the so-called "communications" staff-personnel of the state affiliates; but they were not summoned *en masse* to Washington. Second, in general UTP state-level governmental-relations staff-personnel do not directly supervise UniServ staff; in the MEA, for example, that is the task of the Field Services Department. [272] So, contrary to Harman's assertion, there was no necessity, from the perspective of the UTP chain-of-command, to consult state-level governmental-relations staff-personnel with regard to the use of UniServ staff. Therefore, if (as Harman contended) the governmental-relations staff-personnel "were not peripheral at all" to the subject-matter of the 23 September 1976 conference, it must have been because that subject-

⁹¹ Plaintiffs need not tediously document every assertion made herein with respect to the staff-structure of the UTP. For in an affidavit, defendants' counsel Eric Miller, Esq., has conceded that

[p]laintiffs' counsel has demonstrated a comprehensive understanding of the NEA professional staff structure through the use of the NEA Handbooks * * *. [271]

These *Handbooks* and other UTP reference-materials contain numerous and detailed descriptions of the functions of staff-personnel throughout the organization.

matter included more than "promotional material" and the activity of UniServ staff.

The UTP most likely held the 23 September 1976 meeting to disseminate information about projected UTP electoral activity to the group of individuals selected to supervise that activity at the state level. This is a logical inference from the timing of the meeting (five weeks prior to the general election), from the background of the attendees (governmental-relations staff), and from the text of the plan attached to the Shotts thesis. That plan refers to

[a] full-time coordinator of teacher support activities * * * identified in each state to work with the party leadership and state campaign staff of the endorsed candidate. The coordinator should be selected after both party nominees are selected but prior to completion of the endorsement process so that the staff person can become familiar with other NEA political activities in the state * * * and begin planning for support activities. The coordinators will be drawn from state and UniServ staff ranks. [2, p. 141]

In general, state-level governmental-relations staff-personnel fit this description well. For the most part, they are full-time, salaried professionals, knowledgeable in local politics, "familiar with * * * NEA political activities in the state", and therefore capable of—if not, indeed, highly experienced in—planning campaign-related "support activities" involving UTP members. What these individuals may very well not have known, however, was the full scope of the UTP's program, and particulars about its operation in states other than their own. They may also have been ill-informed about federal election-campaign regulations applicable to the use of the organization's paid staff-personnel on behalf of a presidential candidate. Yet, to fulfill their intended role, they needed such knowledge. An excellent means to have imparted it, in a short period of

time, was a central meeting of all concerned. Which is a more plausible explanation of why the UTP summoned them all to Washington, than is Harman's testimony.

Other testimony of McFarland and Harman with respect to UTP plans for the Carter-Mondale election also abounds in contradictions and implausibility. McFarland, for example, testified that the final UTP plan dealt only with the distribution of propaganda to the organization's members:

Q. [by Dr. Vieira, for plaintiffs] Is it your testimony that this plan was limited to the development of informational materials to be sent out to your members?

A. [Mr. McFarland] Yes, because after that endorsement * * * there wasn't any time to do anything else if you could. And it became basically a communications problem. [273] "

Harman, however, testified that the UTP plan focussed on the so-called "Carter-Mondale member-contact program", a scheme to employ 1,100 UniServ Directors around the United States in establishing telephone-banks to solicit hundreds of thousands of UTP members to vote for the Carter-Mondale ticket:

Q. [by Dr. Vieira, for plaintiffs] So it is your testimony, sir, that the only plan * * * that NEA Governmental Relations Department worked on or came up with for aiding in any way the Carter-Mondale election in 1976 was the Carter-Mondale contact program * * *

" McFarland again and again denied any knowledge of the "member-contact program" or of a major get-out-the-vote drive among UTP members involving UniServ staff-personnel. Part IV.A.2.e., *infra* pp. 229-37.

A. [Mr. Harman] No. My testimony is that that is the only plan that was implemented.

Q. What other plans did the NEA Governmental Relations Department come up with that were not implemented?

A. I can't remember. I can't remember if there were any.

. . . .

Q. Was there some special reason why the Carter-Mondale contact program alone was implemented * * *?

A. Because I believed it to be the only program that would work within the period of time that we had to work it from the time of an NEA endorsement until the time of the election. Something in the neighborhood of six weeks, five weeks, * * * I am not sure. [274]

Harman's claim that the UTP member-contact program alone was implemented because of time-constraints flies in the face of the record and of practical political realities. First, the Shotts thesis indicates that the UTP had over eighty-eight weeks, not "six weeks, five weeks", in which to plan. Second, the planning for involvement of UTP members as campaign-workers in the presidential election did not require building an organization from scratch, at the last minute before the election. Rather, many if not most UTP state affiliates throughout the country already had established networks of political activists, similar in function if not in extent to the MEA's 1340 Club/Committee, who could be mobilized on short notice to intervene and participate in candidates' campaigns. What had to be done, then, (as the Shotts thesis indicates) was simply to identify coordinators to supervise the campaign activity of UTP members in cooperation with the Carter-Mondale campaign-staff in each State. And, as the record shows, the UTP had been in contact and had cooperated with the Carter campaign long before Carter's nomination at the

1976 Democratic National Convention." Third, as is judi-

" From McFarland's testimony:

Q. [by Dr. Vieira, for plaintiffs] * * * was the only thing you know of that you or your staff talked to the Carter campaign about was issues, policy that the Carter campaign might enunciate as the position of the Candidate?

A. [Mr. McFarland] We talked where we could work together, as with other candidates.

Q. Worked together in what sense?

A. In the primaries.

Q. Where did you work together with the Carter campaign prior to the primaries?

A. Our affiliates in North Carolina, Florida, several other states.

* * *

Q. * * * What did the NEA do with respect to the Florida primary to aid Mr. Carter, if anything?

A. Well, I remember we worked very hard for Mr. Carter, the NEA staff worked, operating out of Washington or our regional man working out of Atlanta.

I probably stayed in touch, or did stay in touch with our state leadership in Florida and I am sure that in a number of instances, went around with our state leadership and talked and worked with our teachers to be effective in the campaign.

Q. How did he work with the teachers to be effective in the campaign?

A. Get organized.

Q. Organized to do what?

A. To talk to other members about voting for Jimmy Carter, talked to other members about getting out and working in the Carter campaign, becoming volunteers. [275]

Apparently, according to McFarland (and in implicit contradiction of Harman), the UTP was able—without a detailed plan, and in a short period of time—to inject its members into the Florida primary-election on behalf of Carter. Yet, according to Harman, in the much more vital presidential election, with respect to which the organization had been planning for at least twenty-two months, there was supposedly not enough time to mobilize campaign-workers, even in States where UTP affiliates had long operated successful programs for recruiting their members for candidates' campaigns.

cially noticeable, actual work by rank-and-file campaign-activists generally goes on for only a few weeks prior to an election, in any event—with the heaviest emphasis on the days immediately preceding the vote. The difficult part of any campaign is to create the machinery for recruiting and supervising the workers in the first instance, not to use it once it has been assembled and is functioning. That Harman knows this as a matter of personal experience, his testimony on the involvement of the UTP in the 1977 Virginia gubernatorial election proves.²⁴

In short, neither McFarland's nor Harman's testimony about UTP planning for the 1976 Carter-Mondale election makes sense—from the perspective of its own internal consistency, its correspondence with facts in the record, or its plausibility in terms of the realities of the UTP's staff-structure and of pragmatic politics.

²⁴ Harman's description of the UTP's role in the 1977 Howell campaign illustrates how the organization is capable of assembling a team of experienced campaign-workers and managers in a short period of time. More importantly, the impetus for the NEA involvement in the Howell campaign was apparently a request, coming close to election-time, from its Virginia affiliate; yet none the less the NEA responded with the efforts of governmental-relations and UniServ staff-personnel, including Harman himself. [276] Why such activities could be carried out, at short notice, for the relatively obscure State candidate Howell—and yet not be carried out, with a lead-time of some twenty-two months, for the important presidential candidate Carter—neither Harman's nor McFarland's testimony explains.

2. *Certain of defendants' staff-personnel have testified falsely or incompletely concerning contacts by United-Teaching-Profession staff-personnel with the 1976 Carter-Mondale campaign, the recruitment and deployment of United-Teaching-Profession members as campaign workers for Carter-Mondale, and the United Teaching Profession's "member-contact program" on behalf of Carter-Mondale.*

The testimony of defendants' staff-personnel is equally unsatisfactory with regard to activities of the UTP, its staff-personnel, and members in the Carter-Mondale campaign.

a. *Contacts with and assistance provided to the Carter-Mondale campaign.* At the national level of the UTP, NEA-GRD Assistant Director Robert Harman testified to peculiar ignorance and indifference concerning contacts between the UTP and the Carter-Mondale campaign.

Q. [by Dr. Vieira, for plaintiffs] Do you recall during the 1976 campaign any instance in which anyone from NEA provided anyone connected with the Carter campaign with a list of regional and state contacts within the United Teaching Profession, such as a list of state governmental relations consultants, or a list of UniServ directors, or a list of the chairmen or presidents of state or local political action committees of the UTP?

A. [Mr. Harman] Not of a certainty.

. . . .

A. Just a bit of a recollection that is not clear enough to be specific about.

Q. You mean there is no substance to it, it is just a hazy feeling?

A. That is exactly right.

. . . .

Q. . . . [quoting from Harman Deposition Exhibit No. 32, an NEA newspaper] "Dale Sights, state chairman for Carter's Kentucky campaign, pointed to 'the tremendous influence the Kentucky Education Association had on our great victory in Kentucky.'

"In South Carolina, state coordinator Russ Marane told teachers, 'we needed you—you came—and we won. . . . With the limited resources we had, we could not have put together an extensive field organization without help from the South Carolina Education Association.' "

. . . .

Q. Do you have any knowledge as to how Mr. Sights or Mr. Marane might have come in contact with people from the Kentucky Education Association or the South Carolina Education Association . . . with respect to putting together an extensive field organization on behalf of Carter-Mondale?

A. I can speculate.

Q. Please do, sir.

A. If I were going to manage any political campaign . . . and knew that the national organization of the teachers in that state belonged to had endorsed my candidate, I would certainly go to that state affiliate involved and seek their assistance.

Q. So you think it would simply happen simultaneously [spontaneously?]

A. I don't consider that completely simultaneous [spontaneous?].

Q. I mean in the sense that neither Mr. Sights or Mr. Marane had to be provided with the list or other

information as to whom to contact, what number to call, whom to see.

A. With or without a list, I believe they would have ended up at the Kentucky Education Association or the South Carolina Education Association.

Q. Do you have any personal knowledge other than what you have gleaned from going to * * * Deposition Exhibit 32, as to what went on in Kentucky or South Carolina in terms of teachers aiding the Carter-Mondale campaign with a field organization?

A. I do not.

Q. Do you have any knowledge with respect to that kind of activity in state in the United States in 1976 in the Carter-Mondale campaign?

A. I do not.

Q. You testified a moment ago that some of these NEA Reporters [i.e. newspapers] crossed your desk and you happened to read them?

A. Yes.

Q. Is this one of the ones you looked at [i.e. Deposition Exhibit No. 32]?

A. Yes.

Q. Weren't you * * * curious to ask someone somewhere what was the basis of these statements?

A. No. I was delighted to see that the Carter campaign thought we were so valuable.

Q. But otherwise, your curiosity was so small that you just didn't investigate at all among your fellow workers in Governmental Relations or elsewhere as to what went on in South Carolina or Kentucky?

A. I did not?

Q. Or anywhere else in the United States?

A. Not that I recall. [277]

In fact, however, as NEA-GRD Director Stanley McFarland testified (and as Harman must have known), the NEA

sent to our regional people the list of the Carter campaign coordinators. * * * [W]e also gave the names of our field people and the areas they covered to Carter, and also lists of persons who were important in our state affiliates that they should deal with.

Q. [by Dr. Vieira, for plaintiffs] Was it your understanding that by exchanging that information the Carter campaign people at the state or whatever level * * * would come in contact with these local and Government Relations people and try to work out some sort of cooperative scheme with respect to the campaign?

A. That they would at least talk with each other and cooperate where possible. [278]

McFarland, though, also tried to evade the significance of the UTP contacts with the Carter-Mondale campaign.

Q. [by Dr. Vieira, for plaintiffs] Isn't it true, sir, that you devised a plan in the summer of 1976 to dovetail activities that would be taken in congressional races throughout the country with activities—the purpose of which was to recruit teachers and NEA members and staff members to work on behalf of the campaign as volunteers of some kind?

A. [Mr. McFarland] We urged them to do so, yes.

Q. That isn't the question I asked you. Didn't you devise a plan for doing so, not simply ra ra, let's go and work, but an actual plan?

A. Certainly, we picked out the crucial states in our opinion where teachers might be valuable if they participated for the Carter campaign after the endorsement.

Q. You didn't go further than that, simply identifying the states?

All you did was put pins in a map and say, I hope teachers work there?

A. No. We did more than that. We talked to them and urged them to become involved. * * *

Q. Someone called someone—

A. They may have gone in, our regional staff, and worked with these people, gave them names, information, who to get in touch with, this kind of thing, certainly.

. . . .

Q. * * * Who are these people? Who did they get in touch with?

A. Possibly the state campaign director or the regional campaign director from the Carter campaign.

Q. What did they say to these state directors?

A. You should get in touch with so and so.

Q. The intention being that so and so would do what?

A. That you could sit down and talk with him and get something worked out to cooperate.

Q. Cooperate in what way?

A. I don't know.

Q. No reports were ever made to you as to what was going on down there, how they were cooperating?

A. Well, I am sure they were, but I can't remember any specific report.

.

A. I don't think there was anything reduced to writing. I don't have any recollection. [279]

At the state level of the UTP, duplicity also characterizes the testimony of defendants' staff-personnel with regard to the Carter-Mondale campaign. MEA-GRD Director Gene Mammenga testified that he knew nothing about contacts between the MEA and the Carter-Mondale forces, or about anyone from the organization who provided the campaign with assistance.

Q. [by Dr. Vieira, for plaintiffs] * * * Did the Carter campaign contact the MEA to your knowledge asking for help in this campaign?

A. [Mr. Mammenga] No.

Q. Specifically do you know * * * anyone * * * who was involved in the Carter campaign in the role of organizer or liaison?

.

THE WITNESS: * * * I don't know of anyone who was working in any kind of chairperson capacity to this or that committee, Carter-Mondale—I know of a number of members who had bumper stickers on their cars, wore campaign buttons and did that kind of thing, but I don't know of any of them that served in an official campaign role. [280]

Mammenga also claimed that he had not worked "for particular candidates as a volunteer" [281]—let alone in his capacity as an MEA staff-person.

Overwhelming evidence indicates that Mammenga testified falsely as to his knowledge of and connexion to the Carter-Mondale campaign. First, the record contains a

letter, written on the stationery of the Carter-Mondale Transition Planning Group and ostensibly signed by Jimmy Carter, to MEA President Don Hill, thanking Hill for UTP efforts on behalf of the Carter-Mondale candidacy:

I want to personally thank the members of the Minnesota Education Association who gave me their widespread support in this tremendous effort.

I particularly want to pay tribute to Gene Mammenga of the Minnesota Education Association who made such generous contributions of his time and energy on behalf of the Carter-Mondale ticket. [282]

Of particular interest is that this letter, singling out Mammenga for special praise, was not written to Mammenga, but to Hill. For that reason, it is not likely to be simply a standard campaign form-letter—but instead one that someone composed with the particular purpose in mind of identifying an outstanding, as opposed to a routine, campaign-performance.

According to the testimony of MEA-GRC Chairman J. M. Sokup, the existence of the Carter letter was no secret around the MEA:

Q. [by Dr. Vieira, for plaintiffs] Have you ever seen this letter before [Sokup Deposition Exhibit No. 50]?

A. [Mr. Sokup] I was told of the letter. * * *

Q. Who told you about it?

A. Mr. Hill, I believe. [283]

Pressed by plaintiffs' counsel, Sokup also admitted to knowledge of Mammenga's participation in the Carter-Mondale campaign.

Q. [by Dr. Vieira, for plaintiffs] Your testimony is the only thing you knew that Mammenga did with respect to contributions of time and energy to the Carter-Mondale campaign was to take some materials that had been originally supplied by NEA and perhaps reproduced by MEA and see that they were distributed down to the local levels of the Association and then perhaps from time to time engage in some advance man functions on behalf of the Carter-Mondale campaign? That's the limit of your knowledge of Mammenga's involvement?

A. [Mr. Sokup] Those are specific kinds of things I recall at this time. As with any election, he had certain staff responsibilities to encourage teacher involvement, and as such that would be included in the Carter-Mondale campaign * * *.

Q. * * * in terms of contacting you or contacting other people in terms of getting other people involved in the campaign?

A. Yes.

Q. Do you know if he himself fulfilled some staff function on the campaign committee or group either directly or in a liaison capacity, that is actually working with the candidates' staff people in terms of planning and administering the campaign?

A. As I remember, there was contact with the staff. Whether or not he occupied a specific liaison position or a specific—carried out a specific campaign function, I don't recall that.

Q. But notwithstanding the absence of some kind of a title like staff administrator or whatever, he was in contact more or less on a regular basis with people in

the Carter campaign for at least discussions of matters related to the operation of that campaign?

A. He was involved with some discussions with people in the Carter campaign, as I recall it. [284]

UniServ Director Sue Zagrabelny also recalled some of Mammenga's involvement:

A. * * * I remember Gene Mammenga mentioning something about having some contact with the Carter/Mondale people about what was going to happen at the [MEA] convention * * *. [285]"

Further, Sokup exposed Mammenga's bald assertion that he (Mammenga) had played no role in the Carter-Mondale campaign and knew of no one from the MEA who had:

A. There were a large number of MEA members including elected officials who were active in the Carter campaign. There were staff members who, as individuals, were active in the campaign.

Q. Was Mr. Mammenga one of those staff individuals?

A. Mr. Mammenga is a lifelong Democrat. I'm sure he supported and as an individual worked for the election of Carter. [286]

That Sokup knew of "a large number of MEA members including elected officials", and of "staff members" who were "active" in the Carter-Mondale campaign—while Mammenga, the head of the MEA-GRD, did not—is incredible on its face.

"Zagrabelny testified that, at the MEA convention in October, 1976, "there was a booth of some sort * * * and there was a list of some kind there where teachers could sign up if they wanted to work on the [Carter-Mondale] campaign for the ticket in their local districts". [285]

b. The recruitment of UTP members as Carter-Mondale campaign-workers. The testimony of defendants' staff-personnel is also highly questionable with respect to the involvement of UTP members as campaign-workers in the Carter-Mondale election. NEA-GRD Director Stanley McFarland admitted that the UTP intended to enlist its members in the Carter-Mondale effort:

Q. [by Dr. Vieira, for plaintiffs] * * * But your goal or plan or intention was to recruit, as it were, or mobilize * * * large numbers of members * * * with the aid of your state and local affiliates so that in one way or other they would act as teacher volunteers on behalf of Carter-Mondale?

A. [Mr. McFarland] Yes, that was a hope that many would do that. [251] "

But, incredibly, McFarland claimed that the sole effort of the NEA to recruit UTP members for campaign-service was limited to "persuasion":

Q. Did you prepare materials at the NEA level * * * to distribute to states, to help them in the task * * *?

A. I don't believe so. I think what we did put out was the positions of Carter-Mondale with urging from John Ryor and others to get out and support the ticket.

* * *

Q. The second paragraph [of McFarland Deposition Exhibit No. 28] says, "We are in full agreement as to the need for massive involvement of our members in the campaign, and are working to insure it. Enclosed * * * is a kit that we have distributed widely to our local affiliates to gear teachers up for the effort." What was the contents of that kit?

* * * Once again, a top UTP staff-person agrees that the verbs "recruit" and "mobilize" appropriately describe the organization's activities with respect to campaign-workers. *Contrast* the position of defendants' counsel, *supra* note 55.

A. . . . the positions of both candidates, the urging of Ryor. I don't remember whether it included a Carter-Mondale button or a peanut. But that's basically what it was.

Q. That's what you thought would insure massive involvement in the Carter-Mondale campaign, to send out a peanut to the local affiliates?

A. No.

Q. I know teachers are enthusiastic, but that's a very small—

A. We wanted our members to be sure that they were the positions of both candidates, that they would have to know that.

. . . .

Q. In terms of working for the candidate . . . , the idea was to send these people this material and then have them rush out to work for Mr. Carter?

A. Hopefully, the leadership in the local and state affiliates by this time would also be geared up to urge people to not only get out and vote, but to vote for Jimmy Carter. [287]

The "kits . . . to gear teachers up for the effort", however, were not simply informational, as McFarland asserted. The deposition of Director of NEA Communications Susan Lowell indicates as much:

Q. [by Dr. Vieira, for plaintiffs] Referring to the second page of Lowell Deposition Exhibit 22, . . . you talk about certain things that are going into this endorsement kit for each local association . . .

. . . .

Q. You include certain materials in the list . . .

Q. "Directions on how locals might organize local efforts." Do you recall what that was about? Local efforts to do what?

A. [Mrs. Lowell] No. [288]

Evidently, notwithstanding Lowell's protestation of ignorance and McFarland's evasions, the kits describing "how locals might *organize local efforts*" were an element in the UTP's "working to insure" the "massive involvement of . . . members in the campaign", not simply pro-Carter propaganda for distribution. Indeed, Lowell Deposition Exhibit No. 22 lists the organizing kits as in addition to "posters, printed materials on issues, candidate records, . . . buttons"—not as consisting of those things, as McFarland falsely testified.

Besides saying that she knew nothing about the contents of the organizing kits, Lowell testified that she had no knowledge concerning the involvement of UTP members as Carter-Mondale campaign workers:

Q. [by Dr. Vieira, for plaintiffs] Do you have any knowledge or reason to believe that NEA state or local affiliate staff people or officials were involved in the 1976 elections in recruiting, enlisting or soliciting NEA members to become volunteers in the campaigns of candidates for public office?

. . . .

THE WITNESS [Mrs. Lowell]: No.

Q. When was the first time you heard, if you ever did, that NEA staff people or the staff people of state or local NEA affiliates had been involved in the soliciting, recruitment or enlisting of NEA members to become volunteers in the campaigns of candidates in 1976?

. . . .

THE WITNESS: I don't have, and I never had that information.

BY DR. VIEIRA:

Q. Do you have any reason to believe that there is anyone in the NEA offices in Washington, D. C. who does have that information?

A. I have no way of knowing. [289]

Contrary to her denial, however, Lowell did have an excellent "way of knowing" about UTP members' involvement in campaigns: namely, the NEA-GRD, as she testified at another point in her deposition:

Q. [by Dr. Vieira, for plaintiffs] What were the primary sources for this material that crossed your desk? Who were the people * * * giving it to you?

MR. GOODWIN [counsel for defendants]: Talking about general campaign material?

MR. VIEIRA: No, material directly related to the activities of the NEA, its members, state and local affiliates connected to the Carter-Mondale candidacy?

. . . .

Q. Who provided you with information, if anyone, out of Governmental Relations?

A. [Mrs. Lowell] My primary contact, Bob Harman.

. . . .

Q. * * * What sort of information did Mr. Harman impart to you as to what teachers were doing as volunteers in the Carter-Mondale effort, teacher members of the NEA?

A. A considerable range of normal campaign activities. Distributing leaflets or getting people to vote on election day, or assisting in any kind of fund-raising

activities around candidates. Anything that volunteers normally do.

Q. So your discussions with Mr. Harman focused on the nuts and bolts of campaigns?

A. Yes. [290]

NEA-GRD Assistant Director Robert Harman, though, testified that national-level UTP or UniServ staff were not assigned to the Carter-Mondale campaign:

Q. [by Dr. Vieira, for plaintiffs] There is no instance . . . of lending NEA or UniServ staff personnel to the Carter-Mondale campaign at any level of that campaign?

. . . .

A. [Mr. Harman] I don't know of any instance of that, and I don't believe there was an instance of that.

Q. What is the basis of the absence of belief that there was such an instance?

A. We started to work on the Carter-Mondale campaign, as far as working our plan with them with our members after the endorsement. I cannot believe that there was time for that to have occurred. There wasn't a mechanism for it to have occurred. . . .

. . . .

Q. You could have made contingency plans?

A. True.

Q. Were contingency plans made that involved contact with the Carter-Mondale campaign prior to the NEA Representative Assembly vote [that endorsed Carter-Mondale]?

A. Not to my knowledge. [291]

Contrary to Harman's assertion, however, there were UTP contingency plans looking towards the assignment of UTP staff-personnel to the Carter-Mondale campaign. Besides the general outline in the plan contained in the Shotts thesis [2, p. 141], there was a detailed strategy memorandum, prepared in May of 1976 by NEA Political Education Specialists, and discussed at that time by their superiors Harman and McFarland,⁹⁷ that explicitly refers to specific UTP staff-personnel acting as liaison to the campaign:

The NEA effort must be planned and undertaken in cooperation with the campaign itself, and should be a part of the overall campaign strategy. Thus, it is necessary for the political staff to continue to be involved in strategy sessions with key campaign people * * *. Once the nominee is selected, we will then be in a position to continue to provide input as the campaign develops. The political staff should be assigned liaison duties with the campaign to meet and travel with the campaign, seeing that the teacher needs and concerns are heard and teachers remain an integral part of the effort. [202, p. 3]

Another top UTP staff-man who categorically denied participation in the Carter-Mondale effort by his subordinates was NEA Director Gary Watts:

THE WITNESS: I don't know of any role that our goal had.

BY DR. VIEIRA:

Q. You don't know of any role?

A. We did not participate in the election.

Q. So no one connected with [Watts' goal area] in a staff capacity participated in the Carter-Mondale campaign in 1976, is that what you are telling me?

A. That's what I am telling you. [292]

⁹⁷ *Supra* pp. 200-01.

Watts' testimony may be the most incredible of all in this case. For NEA goal areas under his direction contain numerous so-called "Organization Specialists" on the professional-staff rosters. [293] And even Harman conceded that the skills and expertise of UTP staff trained in techniques of organizing is as relevant to organizing for candidates' campaigns as it is for any other purpose. [294] Moreover, the record contains admissions of the UTP that Watts' organizational specialists have been active as so-called "election pros" in other campaigns. [295] "

The testimony of MEA-GRC Chairman J. M. Sokup also reveals that the UTP recruited campaign-workers for the Carter-Mondale effort:

Q. [by Dr. Vieira, for plaintiffs] * * * do you know whether MEA, MEA-GRC or GRD, IMPACE were contacted by anyone with the Carter-Mondale campaign here in Minnesota for * * * the enlistment of teachers to work on behalf of Carter and Mondale?

A. [Mr. Sokup] I'm aware of a contact from the Carter campaign committee, and to the best of my knowledge it was handled as it always is, that the announcement was made at various functions, and teachers were given the opportunity to volunteer for that. [296]"

c. The UTP's member-contact program in support of Carter-Mondale. The testimony of defendants' staff-personnel is particularly untruthful and evasive with respect to

⁹⁹ Part IV.B.1., *infra* pp. 247-59.

¹⁰⁰ On the various mechanisms employed in the MEA for soliciting UTP members as campaign-workers, *see supra* pp. 113-18. In light of the central role of the MEA-GRD in these contact-mechanisms, Sokup's testimony adds further compelling evidence for plaintiffs' conclusion that Mammenga's asserted lack of knowledge about approaches by the Carter campaign to the MEA is untrue. *See supra* pp. 219-22.

the UTP's so-called "member-contact program in support of Carter-Mondale". NEA-GRD Assistant Director Robert Harman testified extensively about the program. [297] According to him, the member-contact program involved the mobilization by the NEA of all 1,100 UniServ Directors throughout the United States, in a campaign to establish telephone-banks wherein some 75,000 callers would solicit the votes of hundreds of thousands of UTP's members on behalf of the Carter-Mondale ticket.

Amazingly, NEA-GRD Director Stanley McFarland denied any knowledge of this plan, of the role of UniServ Directors in the UTP's Carter-Mondale efforts at the national level, of get-out-the-vote kits prepared by the NEA, and of get-out-the-vote activities involving that level of the UTP:

Q. [by Dr. Vieira, for plaintiffs] * * * are you familiar with a program called Membership Contact Program in support of Carter-Mondale?

A. [Mr. McFarland] Member contact?

Q. A program * * * reaching out and contacting every NEA member throughout the country in support of Carter-Mondale?

A. Not by that terminology at least.

Q. Do you know of any program by which people in the NEA attempted to reach, * * * to contact in some way NEA members with respect to the Carter-Mondale candidacy?

A. My recollection is that Ryor urged the officers and various state people to do this. I don't recognize it as a specific program. [298]

Not only did he claim ignorance of the "member-contact" program by name and functional description, but also he testified to lack of knowledge of the role of UniServ Direc-

tors in the UTP's national efforts on behalf of Carter-Mondale:

Q. In 1976, did UniServ staff . . . play any role in the presidential endorsement process that the NEA carried out . . . ?

A. If they did, I really don't know. My guess is, my speculation is that very little. [299]

He admitted only that UniServ staff-personnel might have been "urged" to "get involved . . . in the political campaigns" at the state and local levels:

Q. . . . are you aware of anything that UniServ staff people did with respect to the Carter campaign—did or were expected to do, had been requested to do?

A. Well, I am sure that there were urgings that they get involved with their members in the political campaigns, whether it be congressional or the presidential campaign.

Q. You mean the members of the local associations?

A. Yes.

Q. What do you mean by "getting involved in these campaigns"?

A. Urging teachers to help organize whatever activities they were involved in. [300]

At the national level, he maintained, UniServ staff did nothing more than distribute propaganda, to his knowledge:

Q. . . . Did they do anything else besides simply sending out this information [*i.e.*, on the UTP endorsement of Carter-Mondale], posting the posters, and handing out the kits and so on?

A. I don't know. [301]

Moreover, he asserted that the NEA had produced no get-out-the-vote kits:

Q. Did you turn out any get out the vote kits?

A. No, we didn't.

Q. Did NEA-PAC do it?

A. No.

. . . .

Q. You said you had no get out the vote kits?

I would like to show you what has been marked as McFarland Deposition Exhibit Number 32.

We are just trying to find out what the facts are here. . . .

. . . .

Q. [quoting from Exhibit No. 32] "The total estimated cost is \$47,000. This includes: . . . get out the vote kits" and the total for that material is \$30,000.

A. I don't have a recollection of what that was. [302]

According to McFarland, the UTP's national-level effort on behalf of Carter-Mondale was limited to "information" distributed to members:

Q. Is it your testimony that this plan was limited to the development of informational materials to be sent out to your members?

A. Yes, because after that endorsement with the time factor, there wasn't any time to do anything else if you could. [303] ¹⁰⁰

Questioned about a plan drawn up in May, 1976, by NEA political-education specialists that outlined various courses

¹⁰⁰ Harman, of course, testified that lack of time limited the UTP national-level effort to the UniServ contact program. *Supra* pp. 210-11.

of action the organization could take to support its presidential endorsee, McFarland made very clear that the UTP's get-out-the-vote activities were—according to him—limited to efforts at the state and local levels:

Q. With respect to the third category [in McFarland Deposition Exhibit No. 35], getting out the vote . . .

A. It was at the basic level of operation. [304]

Exhibit 35, however, does not list the UniServ member-contact program under the "basic level of operation". In that category, it puts activities "[u]sing existing machinery", namely,

Piggy back on whatever happens to be occurring in target districts. * * *

Encourage states to include GOTV [get-out-the-vote] message in their publications, and target Congressional campaigns.

The equivalent of the UniServ member-contact program that the UTP actually carried out, Exhibit 35 lists at the "mid levels" and "maximum effort", namely,

Direct UniServ staff in targeted areas to work a teacher GOTV effort * * *.

. . . .

Phone banks in targeted areas to get out the teacher vote. [202, p. 3]

So, in short, McFarland testified untruthfully time and again on this subject.

Even more incredibly, NEA Manageress of Agency Relations Rosalyn Baker also failed to recall what the member-contact program in support of Carter-Mondale was:

Q. [by Dr. Vieira, for plaintiffs] Are you familiar with something called the member contact program for Carter-Mondale?

A. [Mrs. Baker] Member contact?

Q. Member contact program for Carter-Mondale?

A. Yes, I am. I vaguely remember what it was.

Q. What is that thing?

A. If I remember right, it was an effort—I am trying to remember whether we used the mail—whether it was a takeoff on Mail Day or whether it was something else.

I really don't remember enough of the details. [305]

Harman, however, identified Baker as the key figure in practical adaptation of the plan:

Q. [by Dr. Vieira, for plaintiffs] And in the third paragraph [of Harman Deposition Exhibit No. 16], you mention Rosalind Baker as having adapted the program which [Matt] Reese [, NEA political consultant,] developed; is that correct?

A. [Mr. Harman] Yes.

Q. So is it correct to say that Rosalind Baker was the primary individual in Governmental Relations office responsible for what, shall we say, creation—not creation, but adaptation?

A. She did the work on the adaptation, yes. [306]

Something is amiss when deponents testify as did McFarland and Baker on the UniServ member-contact program. Plaintiffs, however, have a theory that explains the testimony of McFarland and Baker, and the contradictory testimony of Harman as well. The basic premiss of this theory (and the fundamental thrust of the instant Motion) is that

defendants have approached discovery throughout the course of this litigation informed by the principles of the "John Mitchell school of jurisprudence"—that is, "stone-wall". As part of their application of these principles, McFarland and Baker both denied definitive knowledge of the member-contact program: McFarland, in essence, by saying it never happened; Baker, by feigning a lapse of memory. Had it not been for circumstances beyond their control, moreover, this scheme might have succeeded; for Harman was not above giving whatever testimony was required to preserve the cloak of secrecy thrown around the member-contact program (as analysis of other portions of his testimony herein shows).

Unfortunately for defendants, between the depositions of McFarland and Baker, and that of Harman, intervened the deposition of NEA Governmental Relations Consultant R. Dick Vander Woude. As plaintiffs will describe in greater detail hereinafter,¹⁰¹ in preparation for his deposition Vander Woude had to worry about things of weightier consequence than the UniServ member-contact program; and his last-minute arrival in Minneapolis for that deposition did not permit him to review in detail what other deponents had said earlier.¹⁰² And perhaps, uninformed as to these matters, he assumed that a nationwide program involving 1,100 UniServ Directors and potentially 75,000 telephone-bank operatives could not rationally be the object of a campaign of concealment. In any event, he testified to a general knowledge of the program's contours. [308]

¹⁰¹ Part IV.B.2., *infra* pp. 259-97.

¹⁰² Vander Woude arrived and consulted with defendants' counsel only the night before his deposition. [307] Furthermore, the transcripts of the McFarland and Baker depositions had not been prepared, to the best of plaintiffs' knowledge, by that time.

Confronted by this, defendants had little choice but to allow Harman to testify fully on the member-contact program. Perhaps they had forgotten specifically what McFarland and Baker had said. Or perhaps they hoped that plaintiffs would forget (the transcripts of those depositions not yet having been delivered). Or perhaps they saw in this Court's Order of 13 October 1978 an effective bar to any action by plaintiffs directed towards compelling truthful testimony by McFarland and Baker.¹⁰³ Or perhaps they planned to defend against any action by plaintiffs by claiming that McFarland's and Baker's incredible testimony amounted merely to "lapses of memory". Whatever the reason, they finally admitted some of the truth—but not, however (and this is the crucial point), *until events compelled them to do so*.

MEA-GRD Director Gene Mammenga also professed ignorance of the role of UniServ staff-personnel in the Carter-Mondale campaign:

Q. [by Dr. Vieira, for plaintiffs] * * * So as far as you are aware then any activity by MEA members in the Carter campaign in Minnesota was not organized in any systematic way or [by?] anyone in UniServ or anyone at the local level?

* * * *

THE WITNESS: [Mr. Mammenga]: There were some materials sent out by NEA to each UniServ director, and I can't remember the nature of that material now or the directive that was involved in that. I just can't recall. [309]

Again, the absence of memory on this subject stupifies—not only because of the size and complexity of the UniServ member-contact program (which should have impressed almost anyone who learned of it), but also because of

¹⁰³ Compare defendants' recent unsuccessful motion before Magistrate Renner to quash the depositions of Alice Morton and Matt Reese.

Harman's testimony that state-level governmental-relations staff-personnel (such as Mammenga) were specifically apprised of the program so that they could "encourage" the local UniServ Directors to perform their tasks in the telephone contact-network.¹⁰⁴

3. *Certain of defendants' staff-personnel have testified falsely or incompletely concerning evaluations by the United Teaching Profession of the extent to which its members were active in the 1976 Carter-Mondale campaign, and the nature of their activity.*

The testimony of defendants' staff-personnel has not been candid either with respect to evaluations of the extent to which UTP members participated as campaign-workers for the Carter-Mondale ticket in the 1976 election. Here, some background information is necessary.

At the national level, the UTP operates according to a so-called "planning, programming, budgeting, and evaluating" system (PPBES). Under PPBES, NEA staff-personnel develop plans to achieve the goals set out by the governing bodies of the organization, establish programs that define specific activities necessary to implement these plans, budget organizational funds for the various activities in priority order, and, after those activities have been performed, evaluate and report on what has been accomplished. PPBES is extremely comprehensive and detailed, requiring an elaborate descriptive manual for the layman to understand its operations and extent. [310] The very name of the system indicates, however, that evaluations of UTP activities are normal—indeed, expected.

NEA-GRD Assistant Director Robert Harman testified repeatedly, though, that evaluations of the involvement of UTP members in the Carter-Mondale campaign were non-existent, as far as he knew. During the course of the cam-

¹⁰⁴ *Supra* pp. 206-07.

paign, for instance, he said he received no on-going assessments:

Q. [by Vieira, for plaintiffs] During the course of the Carter-Mondale campaign, did you become aware of any reports or evaluations, assessments, whatever you want to call them, coming from NEA governmental relations consultants in dealing with the extent to which NEA's state affiliates were successful or unsuccessful in involving their members in some way for aid or support of the Carter-Mondale ticket?

. . . .

A. [Mr. Harman] This may have involved reports. I don't recall. There were no written reports that I can recall, and I don't recall much in the way of casual phone conversations about it.

BY MR. VIEIRA:

Q. Do you recall written reports coming out of state Governmental Relations Departments or offices?

A. No, I do not. [311]

But Harman's superior, Director Stanley McFarland, recalled that Harman reported to him on the involvement of UTP affiliates in the Carter-Mondale campaign:

Q. [by Dr. Vieira, for plaintiffs] Did those individuals [i.e. the NEA governmental-relations consultants subordinate to Harman] report back from time to time as to the extent of activity in these cooperating states and whether their activity was sitting in with the vision or picture that people in NEA had been led to believe in the state plan as to what they would do?

A. [Mr. McFarland] Yes.

Q. Mr. Harman came to you?

A. Yes.

Q. What did he tell you what was going on in terms of those states?

A. There was a lot of state X or Y. There is little going on. We still don't have a state plan. I have no memory, I cannot remember the specifics of that at this time. [312]

Director of NEA Communications Susan Lowell also testified that Harman was her primary source of information about the role of UTP members in the Carter-Mondale campaign:

Q. [by Dr. Vieira, for plaintiffs] Who provided you with information, if anyone, out of Governmental Relations?

A. [Mrs. Lowell] My primary contact, Bob Harman.

. . . .

Q. So you had information provided to you from time to time by Mr. Harman on the activities of the NEA, its affiliates and members connected with the Carter-Mondale campaign?

A. Yes.

. . . .

Q. . . . Did it relate to activities by teachers as volunteers in the Carter-Mondale campaign . . . ?

A. Yes.

Q. . . . What sort of information did Mr. Harman impart to you as to what teachers were doing as volunteers in the Carter-Mondale campaign effort, teacher members of the NEA?

A. A considerable range of normal campaign activities. Distributing leaflets or getting people to vote on election day, or assisting in any kind of fund-raising activities around candidates. Anything that volunteers normally do.

Q. So your discussions with Mr. Harman focused on the nuts and bolts of campaigns?

A. Yes.

. . . .

Q. In the course of these discussions, did Mr. Harman ever inform you as to what his sources of information were?

A. Not specifically.

Q. Do you recall any particular instances * * * ? Did he ever refer * * * to a particular congressional district that was important, or to a particular state in which he considered that teachers were working very hard?

A. Nothing leaps to mind. That may be.

Q. Did Mr. Harman ever have any documentation that he showed you or presented to you, such as reports or memoranda or letters from state or local affiliates, as to what teachers were doing or how many teachers were volunteering or particularly interesting anecdotes or stories about teachers present in the Carter-Mondale effort?

A. He may have. I don't recall anything specific.

Q. But in the course of discussions that you had with him, it is not unlikely that that type of information is being passed back and forth?

MR. GOODWIN [counsel for defendants]: She answered your question.

MR. VIEIRA: When she says "he may have," the "may," is because there is a vague recollection that that was the type of information being communicated?

THE WITNESS: Yes. [313]

And one of Lowell's subordinates, Rozanne Weissman, requested Harman (along with several others) to provide her with

as much behind-the-scenes information about our role in this election and congressional elections as possible. I would appreciate it greatly if you would all forward everything with news interest, color, and humor to me during the rest of the campaign, and I will do the same with you. [45]

Furthermore, Harman's subordinate, regional governmental-relations consultant R. Dick Vander Woude, also testified that he reported to Harman on the role of UTP members in the Carter-Mondale campaign:

Q. [by Dr. Vieira, for plaintiffs] Was there any request made by anyone in Washington of which you're aware for information relating to the number of teachers that turned out or the types of activities which NEA members in various states participated in support of Carter-Mondale, sort of an assessment of the extent to which teachers had responded to these requests?

A. [Mr. Vander Woude] I think we probably did, yes.

Q. Well, probably. Did you play any role in it in terms of collecting information or transmitting it back to Washington?

A. I see the assessment of member involvement in campaigns of endorsed candidates as very much ongoing kind of thing. It's important to the organization to have some sense of whether its rank and file membership supports its ideas and programs, and no one has to tell me to make those kind of assessments or to share my observations. It's just something I do.

Q. In 1976, how did you go about doing it?

A. Well, I would observe, I would communicate. I mean, not in writing; you know, either in conversation on the phone with Baker or Harman, presumably; maybe others. * * * [308, pp. 67-68]

So, here is Vander Woude, communicating information concerning the role of UTP members in the Carter-Mondale campaign to Harman; here is Weissman, requesting Harman to provide her with "behind-the-scenes information" on that role, and promising to reciprocate; here is Lowell, aware of conversations with Harman in which he showed her reports or memoranda concerning that role; and here is McFarland, testifying that Harman reported to him on campaign activities of UTP state-affiliates—and yet, there is Harman, claiming that he recalls no written reports, and little of oral reports, too, describing UTP members' activities on behalf of Carter-Mondale.

Harman's testimony as to the non-existence of evaluations or assessments made after Mr. Carter's election throws further light on the subject:

Q. [by Dr. Vieira, for plaintiffs] And in this particular election, the election of—first presidential candidate whom NEA had ever endorsed, as far as you are aware, there was no attempt made by the Governmental Relations Department at NEA to determine the extent to which NEA's state and local affiliates had or had not participated or aided the campaign of Mr. Carter and Mr. Mondale?

A. [Mr. Harman] I can't define a level of looking for that information for you. We did not seek it by sending out anything that I can recall that said, tell us everything you did.

Q. Any kind of survey whatsoever, even a survey that would go into it superficially as to ask a state

association, did you conduct a separate program other than the Carter-Mondale contact program?

A. I don't recall that.

Q. So, you are telling me in this particular election, the NEA Governmental Relations Department was, as far as you know, willing to make no investigation on its own with respect to the extent its affiliates had aided or not aided Carter-Mondale?

A. Well, if I am correct in my recollection, I know I would have to say it is a recognition that we are unable to get that data from state affiliates. They don't wait around all day to file reports with us about what it is that they do.

Q. Are you aware of activities on the part of NEA Communications Department to seek such information?

A. Specifically related to the Carter-Mondale?

(Counsel nodding.)

THE WITNESS: I don't recall. They may have.

. . . .

Q. Was there ever any discussion . . . whether it would be an advisable thing for Governmental Relations to do some sort of survey to determine the extent state or local affiliates participated to [through?] their volunteers in the Carter-Mondale effort?

A. I don't recall.

Q. You are just completely uninterested in that, is that your testimony? The Governmental Relations Department had no interest in finding that out?

. . . .

A. I think there was an interest.

Q. But that interest never found its way into some implementation? No one started asking questions * * * ?

A. I am only interested in hard data about what really happened, I am not interested in historical run-downs of what any affiliate says it did.

Q. Did you ever make attempts to determine what hard data they had? * * *

A. Yes.

Q. What was that with respect to the Carter-Mondale campaign?

A. None that I can recall.

Q. With respect to other campaigns?

* * * *

A. No, not that I can recall. No.

Q. This "not that you recall" covers a period of how long, going back to when?

A. 1972.

Q. From 1972, '74, '76, '78, those four elections, you, Robert Harman, never investigated in any way the existence of hard data with respect to the involvement of staff or members of the state or local affiliates of the NEA of [in?] candidates' campaigns?

A. True.

Q. And the Governmental Relations Department of the NEA, as far as you know, in '72, '74, '76, '78 elections never made any such investigations; is that correct?

A. I don't recall any. [314]

McFarland's memory was not quite as defective as Harman's; for he recalled at least the existence of a survey

relating to UTP members' participation in the Carter-Mondale campaign:

Q. [by Dr. Vieira, for plaintiffs] * * * was there an attempt made to analyze or study the role of teachers as campaign volunteers * * * in the '76 Carter-Mondale election to make a study of the number of teacher volunteers?

A. [Mr. McFarland] I think we tried to find out how many * * * teachers were active in the Carter campaign.

Q. How did you go about doing that?

A. Made a request, I think, through our state affiliates if they had information.

* * *

Q. Are you aware of any return of information from these people?

A. Not specifically. I am sure there was some return, but again, * * * it was probably very spotty.

Q. Was there a report or summary of this information prepared for presentation to yourself or Mr. Herndon or others?

A. I think we came up, probably with some round numbers, and offhand I don't remember what they were * * *. [315]

So, here is McFarland, saying that the NEA-GRD surveyed the extent of UTP members' involvement in the Carter-Mondale campaign and received sufficient information to produce a report; and here is Vander Woude, explaining how such data is "important to the organization"—and yet, there is Harman, claiming that he recalls no surveys, relies on no reports from UTP state-level affiliates, and in every election from 1972 to 1978 has never

investigated the role of UTP members in candidates' campaigns.

Harman's testimony as to the sources from which UTP publications receive information on the organization's members working in campaigns provides further evidence:

Q. [by Dr. Vieira, for plaintiffs] You testified a moment ago that some of these NEA Reporters [describing political activities of UTP members] crossed your desk and you happened to read them?

A. [Mr. Harman] Yes.

. . . .

Q. Do you have any understanding . . . as to how it was that the NEA Reporter came with this information . . . ?

A. I do not. [316]

Susan Lowell knows:

Q. [by Dr. Vieira, for plaintiffs] Let's take a look at some older exhibits here. Here is one, Harman Deposition Exhibit No. 26 . . . a copy of the NEA Reporter from November 1976. . . . it begins with a banner headline "Teacher-Politicians 1976". . . .

. . . .

Q. Where do they get the information . . . in Harman Deposition Exhibition 26?

A. [Mrs. Lowell] By talking with Government Relations staff members, with leaders, with state affiliate people. . . .

. . . .

Q. Who in the Governmental Relations office provides information of that type to people connected with Communications?

A. That would vary considerably. I would guess Mr. Harman provides, primarily. [317]

How Harman provides what he claims he neither knows nor makes any attempt to ascertain, is left for plaintiffs and this Court to conjecture.

In summary, with regard to the activities of the UTP, its staff-personnel, and its members in the 1976 Carter-Mondale campaign, neither Baker, nor Lowell, nor McFarland, nor Mammenga, nor Harman—and particularly the three last named—has told “the truth, the whole truth, and nothing but the truth” in this case.

B. CERTAIN OF DEFENDANTS' STAFF-PERSONNEL HAVE NOT TOLD THE WHOLE TRUTH ABOUT THE EMPLOYMENT OF UNITED-TEACHING PROFESSION GOVERNMENTAL-RELATIONS CONSULTANTS AND OTHERS AS “ELECTION PROS” IN CANDIDATES' CAMPAIGNS.

Throughout the course of discovery in this case, plaintiffs have worked to document with particularity what the national-level publications of the UTP report again and again: namely, that UTP staff-personnel provide valuable campaign-services to candidates' campaigns on a regular basis. Defendants, however, have thrown up one improper obstacle after another to the development of a record concerning this matter. The primary obstruction has been false and obscurantist testimony—coupled, in one instance, with what plaintiffs can adequately describe only as a cover-up, and for the exposure of which plaintiffs were compelled to hire private detectives.

1. *Although even United-Teaching-Profession publications characterized him as an “election pro”, one United-Teaching-Profession governmental-relations consultant deposed by plaintiffs attempted to deny or obscure his role in a 1976 campaign.*

The term "election pro" as applied to certain UTP staff-personnel is not an eccentricity of plaintiffs, but instead a description used with pride in the organization's own publications. Following a special congressional election in the Spring of 1976, the UTP's national-level newspaper reported on how "teacher power elects New York Democrat":

"Teacher power buries money power." That's the assessment of someone who should know—the nation's newest Congressman, Democrat Stanley Lundine * * *.

Lundine gave extensive teacher support the credit for his win against high odds and dedicated his victory statement to the cadre of more than 100 teacher volunteers who were the core of his campaign. * * *

Lundine's slim campaign chest was augmented by a \$5,000 contribution from NEA-PAC (the maximum under federal law), but he found teacher determination and skill a much more valuable contribution, stating: "Teachers operated phone banks, drove cars, sat babies, and did all the pedestrian things so vital to victory." The teachers also worked feverishly to contact their 6,000 colleagues in the district to line up more support for Lundine and pressed an extensive get-out-the-vote drive which brought a heavy turnout on election day.

Next to the text, the story featured two pictures, one of which was captioned "Teachers and NEA field representatives view map for get-out-the-vote drive in the winning head-campaign headquarters of * * * Lundine"—and identified two so-called "NEA organizing specialists", Richard Lathrop and William Hammer. [318] Another UTP publication elaborated on the same subject, quoting a state-level staff-person as

prais[ing] the teachers' get-out-the-vote drive that produced the large Lundine vote. [He] told [the publi-

cation] he'd like to add special thanks from the teachers * * * "to NEA for making available election pros like Joe Letorney, Rick Lathrop, and Ben Laime to help us get the job done." [319]

Informed by these reports, plaintiffs deposed one of the "election pros", NEA Governmental Relations Consultant Joseph Letorney.¹⁰⁵ Letorney's testimony on the subject of "election pros", however, turned out to be a series of untruths, evasions, and equivocations.

For example, early in his deposition and before being shown copies of the UTP publications quoted above,¹⁰⁶ Letorney claimed that he did not deal with staff-personnel from Watts' department in the fulfillment of his (Letorney's) duties:

A. [Mr. Letorney] No, I did not deal with his staff [referring to a subordinate of Watts] with regard to my duties.

Q. [by Dr. Vieira, for plaintiffs] I said to dovetail. There might be situations under which in the performance of your duties it was expedient for you to use the services of someone who was in Mr. Lawton's staff
* * *

A. I know what you are asking, * * * but that was not the case.

Q. Is not the case here or is never the case?

A. It is never the case.

¹⁰⁵ Letorney and Laime were and are Governmental Relations Consultants. At that time, Lathrop and Hammer were Organizing Specialists in other NEA goal areas.

¹⁰⁶ Another example of the "I-need-the-document-to-tell-the-truth" ploy so favored by defendants. See *supra* note 89, pp. 197-99.

Q. What you are testifying to, then, it has never been the case since you have been a regional government relations person since 1972 that you have cooperated or collaborated with people from Mr. Watt's division in activities related to government relations duties of yours?

. . . .

THE WITNESS: The answer is, I have not involved Watts' staff in my duties and responsibilities.

BY DR. VIEIRA:

Q. Has someone else ever involved them?

A. Not to my knowledge. [320]

This denial, of course, was a blatant untruth, as plaintiffs shall show shortly.

Also early in his deposition and before being shown copies of the documents quoted above, Letorney denied participation in the enlistment of UTP members for campaign-work:

Did you in any way assist people who were organizing the phone banks to get the names of teachers who might be willing to volunteer in this phone bank?

A. No.

Q. . . . did you supply the names of teachers to people who were in fact organizing these activities for campaigns so they would be able to seek out volunteers to do this work?

MR. MILLER [counsel for defendants]: Will you read that?

(Whereupon, the reporter read the question . . .)

MR. MILLER: Answer it if you can.

THE WITNESS: The answer is no. [321]

Q. Not organizing the phone bank?

Later, after having been confronted with reports of his role in the Lundine effort, Letorney admitted that he had, after all, been involved in organizing telephone banks for a candidate's campaign:

A. * * * I was involved in coordinating by encouraging teacher leaders in that special Lundine race * * *.

Q. * * * I have great difficulty understanding what the word "encouraging" means in terms of function, behavior you went through.

A. To acquire volunteers and to seek volunteers, of the teachers, to come in and have the need to have a phone bank and review with them the technicalities of the nature that you have described concerning what a phone bank is. [322]

One untruth—that he had never been involved in organizing telephone-banks—recanted.¹⁰⁷

Another untruth—that Laime had been present only to "train" UTP members—Letorney also grudgingly recanted under close questioning:

Q. What did you explain to Mr. Harman was the purpose of bringing Laime into the Lundine campaign headquarters?

What did you expect Laime was going to do?

A. He would do essentially the same things I did.

Q. Conduct a training session?

A. Yes. He is also a training specialist.

¹⁰⁷ Note, however, Letorney's strange use of the term "encouraging", which when pressed he explained as meaning "organizing". Where did Letorney learn to use the word "encourage" in such a deceptive fashion?

Q. The one you testified a moment ago, he was going to cooperate with you in that?

A. Not necessarily training session, but to work on the training programs, telephone banks specifically.

Q. You had me confused about training.

There was a normal training session you testified that came sometime before this Lundine campaign?

A. That's correct?

Q. Was there any other training program that was scheduled between that normally scheduled one and the Lundine campaign?

A. No, there was not.

Q. So Mr. Laime didn't cooperate with you in any other training program that occurred between the normally scheduled one and the Lundine campaign, did he?

A. Not to the extent of training programs, but to work the program.

Q. So he wasn't involved in training at all, he was involved in the implementation?

A. Of working with our members to implement the telephone banks.

. . . .

A. I didn't see him as a manager per se. I saw him as a person who was coordinating.

Q. In terms of coordinating, what was that he did? How did he go about coordinating this activity?

A. He would work with the teachers or teacher leaders who were involved in the telephone like I did, in disseminating the teacher lists of the school district into sheets, to put them into the categories that we

would recommend in the use of the telephone * * *.
[323]

But when it came to the role of Lathrop and Hammer, the "organizing specialists" from Watts' division, Letorney evaded question after question:

Q. How did Mr. Lathrop come to be involved in this campaign?

Did you recruit him?

A. I don't know. I did not recruit him.

Q. Did you talk to Mr. Harman or anyone else in the government relations office about the advisability of having Lathrop assigned to this campaign?

A. No, I did not.

Q. Did you talk to anyone in Mr. Watts' office about the advisability of having Mr. Lathrop assigned?

A. No, I did not.

* * *

Q. You say in the first sentence of this letter [to Harman, Letorney Deposition Exhibit No. 20,] "May I take this opportunity to thank you for arranging to have Rick Lathrop help us in the Lundine campaign."

You go on, "For the record, may I say that words cannot express the tremendous effort Rick put forth in working with our members. He thoroughly organized the system to make contact with our members * * *."

* * * how would Mr. Harman arrange to have Rick Lathrop help out in the Lundine campaign?

MR. MILLER [counsel for defendants]: Objection to the extent that it calls for speculation on the part of the witness.

Answer if you know.

A. I don't know.

BY DR. VIEIRA:

Q. Here, you thank him for arranging to have Lathrop there.

Did you have a discussion with Lathrop as to how you get there, in the Lundine campaign?

A. * * * It seems to me the request might have come or must have come from the [UTP state affiliate] for Lathrop to participate. I presume that Harman was asked to provide, arrange for Lathrop to be there * * *.

Q. Mr. Harman is your immediate supervisor, is he not?

A. That's correct.

Q. Is it a normal thing in your region for state or local affiliates to go over your head, as it were, and ask your immediate superior to provide services for them without contacting you or copying you in?

MR. MILLER: Objection as to what is the normal practice of a state and local affiliate in Mr. Letorney's geographic area.

Answer if you can.

A. I forgot the question.

BY DR. VIEIRA:

Q. Is it a normal thing—by normal, I mean in your experience has it happened frequently—four or five times a year, if that many, that state or local affiliates go over your head to your superior, Mr. Harman to ask for particular services to be provided?

MR. MILLER: Objection to the extent it characterizes whatever the [UTP state affiliate] may have done with respect to providing a staff individual as you characterize it going over the head of Mr. Letorney.

THE WITNESS: I can't answer that.

BY DR. VIEIRA:

Q. Do you know of any other occasions than this in which one of the state or local affiliates in your region has gone directly to Mr. Harman with a problem related to campaign activities of the type we are describing here in the Lundine campaign without simultaneously or first contacting you?

A. I don't recall any.

. . . .

Q. Do you know how it happened that Harman arranged for Lathrop to get into the Lundine campaign?

Do you know who Harman contacted or what he had to do to get a man in Mr. Watts' division assigned over to your region in the Lundine activities?

A. I really don't know what he would have to do.
 . . .

Q. With respect to Mr. Hammer, also identified as an organizing specialist in Mr. Watts' group, did you contact Mr. Harman in order to make arrangements for Hammer to come in and work on the Lundine campaign?

A. I don't remember doing that, I do not recall.

Q. . . . How was it that Hammer was assigned, do you know?

You said, you didn't contact Harman with respect to Lathrop, you didn't make that arrangement. You just testified that you didn't make the arrangement with Hammer.

Do you know if anybody went to Harman and said, "Get us this fellow Hammer?"

A. . . . I am having a very difficult time recalling the specific details because it is not a general rule.

Q. What is the general rule?

A. The general rule is I work the area myself.

Q. Are there any other instances in 1972 to the present, in which, in connection with electoral contests, people from outside your area who are normally assigned to Mr. Watts' division would come . . . to participate in campaigns?

. . . .

A. I cannot recall any instance that that would have been the case.

Q. Did you receive any communications from Mr. Harman prior to the appearance of Mr. Lathrop and Mr. Hammer asking you for your opinion as to whether these people were needed in the Lundine campaign, whether it was a good idea to send them down there to try to assign them to the Lundine campaign?

A. I don't recall.

. . . .

A. . . . When I saw them there, that's when I knew they were there.

Q. Did you ask them how they got there, these people you haven't seen apparently before in your region suddenly appear in a campaign and it is a mystery, do you ask them, "How did you get here?"

A. They just told me they were here to work the campaign with our members.

Q. Just like that, and you didn't inquire anything further into who sent them?

A. I was always looking for help. I am glad to see anybody who is willing to help.

Q. Did they volunteer any explanation for their miraculous appearance?

MR. MILLER: We haven't established whether it was miraculous or not. In any event, they appeared.

BY DR. VIEIRA:

Q. Did they give you an explanation how they came to be there?

A. No, and I didn't even ask.

Q. Did you ask Mr. Harman afterwards or anyone else in the NEA how it was that Watts' people suddenly showed up in this campaign without your knowing anything about it until they arrived, this unique instance?

Weren't you surprised? Didn't you go and ask them, "Where can I get more of these people?"

You said you needed many of them. Did you go to Mr. Harmon and make any inquiries?

A. I didn't even think of that. * * *

Q. Didn't you think that if it were possible to arrange for someone of the caliber as you described it here, Mr. Lathrop, Mr. Hammer for a special election, that it might also be possible to arrange for these people or people of equal ability to be brought in for the normal election and that might be a valuable resource for you to have on tap * * * ?

MR. MILLER: Objection. Calls for the witness's conjecture as to what may have been two years ago.

BY DR. VIEIRA:

Q. What he thought is the situation.

(* * * the pending question was read * * *)

MR. MILLER: Object on the ground that it is a multiple question.

Answer if you can.

THE WITNESS: I really can't answer that.

. . . .

BY DR. VIEIRA:

Q. . . . I find it incredible to believe that you are involved in this Lundine campaign as you have described that Lathrop and Hammer appeared on the scene and performed . . . quite to your satisfaction . . . and that thereafter you made no attempt whatsoever . . . to discuss how it was that Lathrop and Hammer came to be assigned to this campaign . . .

. . . .

Q. Can you explain why it was under those circumstances that you made no efforts whatsoever to find out how these individuals became involved in the campaign?

MR. MILLER: Object. That question and a number similar to it have been asked and answered by the witness. He said he didn't know. You yourself characterized it as miraculous.

THE WITNESS: I have answered the question. [324]

Evidently, both Letorney and defendants' counsel were extremely sensitive to plaintiffs' inquiries concerning the deployment of UTP "election pros" in campaigns, especially "election pros" from Watts' divisions—and extremely reluctant to answer questions on that subject with candor.¹⁰⁸

¹⁰⁸ That Letorney was quite willing to testify falsely, even about relatively inconsequential matters, the record also reveals. For instance, Letorney claimed that at the 1976 Democratic Convention, which he attended as a UTP staff-man aiding the delegates from the organization, he did not cooperate with people from either the

Experience with this sensitivity and reluctance finally led plaintiffs to engage professional investigators to search out and expose the UTP's "election pros" wherever they might be. And plaintiffs' expectations were not disappointed by what the detectives found.

2. *Even after private detectives engaged by plaintiffs discovered a United-Teaching- Profession governmental-relations consultant supervising a candidate's telephone-bank in the 1978 Minnesota primary election, defendants still attempted to deny or obscure his role in the campaign.*

A complete statement of what plaintiffs' private investigators discovered is a prerequisite to understanding defendants' duplicity in the matter of UTP "election pros" and their machinations. Simply put, Mr. Jeffrey B. Saunders, an investigator employed by Associated Investigators of Washington, D.C.,

- (i) volunteered to work as a telephone-bank operative in the 1978 primary campaign of Donald Fraser for United States Senate;
- (ii) arrived at the candidate's telephone bank, and met an individual who called himself "Dick Ryan" and who acted as if he were an MEA member;
- (iii) was instructed by "Ryan" in the art of soliciting votes by telephone, and provided by "Ryan" with MEA computer print-outs listing the names, addresses, and telephone-numbers of MEA members;

NEA Communications Department or the Labor Coalition Clearinghouse. [325] In fact, Letorney and the other NEA Governmental Relations Consultants, together with staff-personnel from the Communications Department, formed part of a complex staff-operation intimately interlocked with the Coalition and its various member-organizations. And so Baker, Harman, McFarland, and Vander Woude testified. [326]

- (iv) later discovered in an interview with MEA-GRD Assistant Director Ken Bresin that "Dick Ryan" was actually R. Dick Vander Woude, NEA Governmental Relations Consultant for the region including the State of Minnesota; and
- (v) was informed by Bresin that, on advice of "NEA's attorneys" in connexion with the instant litigation, Vander Woude would perform certain political organizing activities in Minnesota instead of Bresin.

That is, Investigator Saunders discovered, as plaintiffs have contended all along, that NEA Governmental Relations Consultants work as "election pros"; that this work involves their instruction and supervision of campaign-workers including non-members of the UTP in campaign-facilities established by the candidates themselves; and that in the course of this work they use lists of UTP members supplied by UTP affiliates. In addition, Investigator Saunders determined that, because of the pendency of this litigation—and not because of any UTP policy or practice prohibiting the involvement of organizational staff-personnel in the campaigns of candidates for public office—the UTP had, in effect, "gone underground" in Minnesota as far as its political activity was concerned.

More specifically, Investigator Saunders testified that he had approached the Fraser campaign and met with one Jeff Peterson, its "special-interest-group coordinator":

Q. [by Dr. Vieira, for plaintiffs] Did you have a discussion with him?

A. [Mr. Saunders] Yes. . . . Then the conversation came around to the telephone-tree, and he said that the Minnesota Education Association had endorsed both Boschwitz, . . . a Republican, and Fraser, . . . with the DFL . . .

. . . .

Q. * * * Peterson told you that the MEA was going to operate a telephone tree for both Boschwitz and Fraser simultaneously?

A. Right.

Q. The Fraser people couldn't support that, and therefore, the Fraser people were going to do what?

A. He said the Fraser people were going to set up their own telephone tree that was going to be manned by volunteer MEA * * * teachers, and it was going to endorse strictly Fraser.

Q. How were these volunteer MEA teachers to be enlisted or recruited?

A. He told me they were volunteers that were going to be recruited by MEA staff member Ken Bresin.

He then described his activities in the candidate's telephone bank:

Q. After you learned that the Fraser telephone tree was in the Modern Merchandising Building, what did you do?

* * *

A. * * * I went to the telephone tree, and there met with Jeff Peterson and volunteered my services.

* * *

Q. Who else was there when you arrived, besides Mr. Peterson?

A. There was * * * another individual who introduced himself as Dick Ryan; there was a woman who just identified herself as a nurse * * *.

* * *

Q. * * * what kind of an operation did they have set up there physically?

A. . . . There were computer print-outs, a lot of little cubicles with desks and telephones like for salesmen. . . .

. . . .

A. I first went to Peterson. He was very busy, so he introduced me to Dick Ryan to instruct me as to how to use the telephones. Mr. Ryan then . . . gave me an instruction sheet.

. . . .

Q. After Ryan gave you this instruction sheet, what did he do?

A. He . . . also gave me a sheet with a script on it.

. . . .

A. A script as to the conversation I was to use on the telephone.

. . . .

Q. This sheet, Deposition Exhibit No. 2, is entitled "Fraser Phone Message—MEA Teachers." It begins "Hello, my name is" and written in there is the name Dick Ryan . . . , then some type, and below it is some handwritten notations. Do you know who made those handwritten notations?

A. I did not see anybody make that, but I assume it was Mr. Ryan.

. . . .

A. This is the same sheet he gave me. When he gave it to me, he said, "You can just take mine."

. . . .

Q. . . . did Mr. Ryan do anything else with you, give you any other information?

A. . . . he proceeded to make several telephone calls in my presence to show me how to do it. . . . he

gave me a computer printout of names and addresses and telephone numbers.

. . . .

Q. . . . at the time that you were receiving instructions from Ryan with respect to being a telephone tree operator, who did you think Ryan was?

A. I assumed he was an MEA teacher. . . . I assumed everybody other than Peterson was an MEA teacher.

Q. In fact, Deposition Exhibit No. 2, the Fraser phone message, begins "Hello, my name is Dick Ryan. I'm an MEA teacher calling for Congressman Don Fraser"

A. Yes, it does.

Q. Mr. Ryan instructed you, you said, in making phone calls. Could you go through the various steps of the phone calling process that you were instructed to perform?

. . . .

A. . . . he told me that these were the names of people I was to call and if I were to make contact with these people, I was to make a mark beside the name He told me to make contact with these people and go through this script.

. . . .

Q. You said you had the telephone numbers of the people to call because it was made available to you from a computer list

A. Yes.

Q. Did you ask where this list came from?

. . . .

A. . . . I asked [Ryan] what this was. He said it was a list of MEA teachers. I asked him where it came from. He said, "Well, probably MEA."

Q. Was that the only computer printout that you saw in the telephone bank?

A. No. There was a whole stack of them. I would say probably a hundred sheets.

Q. What were the telephone tree operatives doing with those sheets?

A. They were all making calls from the sheets, similar to what I was doing.

. . . .

Q. Did you have any occasion to have any conversations with the nurse present in the telephone tree?

. . . .

A. During a break in the calling, I mentioned the fact that I was not an MEA teacher and asked if there was any problem with misrepresenting myself as one over the telephone. She said, "Don't worry about it. I am a nurse." Mr. Ryan was also in this conversation. He said, "No, there is no problem." [327]

Investigator Saunders also testified about an interview he had with Bresin a few days later.

Q. So you went to Mr. Bresin's office and had a conversation with him; is that correct?

A. Yes, I did.

. . . .

A. I explained to him that I was a student . . . interested in doing my master's thesis in the area of politics and education. We then proceeded to talk about that. Then I proceeded to ask him, "Well, what about the organizing of the union and teachers?"

He said that well, he, personally, couldn't do anything; his hands had been tied.

. . . .

A. * * * I said, "How do you go about organizing teachers?"

He said he, personally, couldn't do anything, that his hands had been tied, that because of the lawsuit with the National Right to Work Foundation, NEA's attorneys had advised him not to get involved.

Q. Now that's the phrase he used or term he used, NEA's attorneys'?

A. Yes, he did.

Q. Advised him not to get involved in what?

A. In the election, on company time. * * *

. . . .

A. I said, "Well, if you yourself cannot do the organizing, who is doing it?"

He said, "Well—" he kind of hesitated for a second. He said, "Well, the NEA regional director was coming in and—"

. . . .

A. * * * I asked him who this NEA regional director was, and he said—he identified him as Dick Vander Woude. He said, "Well, you were on the telephone tree on Thursday. He was the big, tall guy."

. . . .

A. * * * I said, "Well, yes, I met the guy. He told me his name was Ryan and not Vander Woude."

He said, "Well, he thought Vander Woude was too big a mouthful to use over the telephone."

. . . .

A. Then I asked him when the activities would be gearing up for the general election. He told me that he had no idea, since he wasn't doing anything himself. I said, "Well, then, if anything is going to be going on,

it would be the NEA regional director doing it!" He said yes.

. . . .

Then we talked a little bit about the suit. He explained to me it had to do with the fair-share statute.

Q. You are talking about the suit in which this investigation was performed?

A. Yes. [328]

So much for the truth of the matter. It is very revealing. But even more revealing is the testimony that defendants' staff-personnel Bresin and Vander Woude gave in their depositions before plaintiffs disclosed the existence of the investigator. Apparently, defendants feared that plaintiffs knew something about Bresin's and Vander Woude's connexions with the Fraser campaign; for both Bresin and Vander Woude came prepared to tell parts of the story, albeit different and oft-times contradictory parts.¹⁰⁰ Analysis of these parts, though, tells a story all its own. First, Bresin.

Briefly put, Bresin's explanation was that Vander Woude happened to be in Minneapolis-St. Paul "assessing" local candidates (although Bresin did not know precisely why); that he (Bresin) was a "volunteer" for the Fraser campaign, and in that capacity "recruited" Vander Woude for the telephone-bank; and that the two of them worked together for two nights, using scratch-lists of MEA members collected by Bresin and searching the public telephone-book for numbers.

¹⁰⁰ More likely than not, defendants anticipated the worst from the very noticing of the depositions, since both Bresin and Vander Woude are only lower-echelon staff-men and therefore, absent some special circumstances, of only secondary importance. The special circumstances were well known to defendants, however.

Q. [by Dr. Vieira, for plaintiffs] Did you understand that one of the purposes of these meetings with Vanderwoody and these . . . candidates . . . was that Vanderwoody would go out and try to get some volunteers or people to help any of the candidates?

A. [Mr. Bresin] It wasn't clear to me. No.

Q. Well, what was the purpose of Vanderwoody assessing these campaigns? What did you understand was going to be done with this knowledge?

. . . .

A. I really don't know. . . .

. . . .

Q. So he came in from out of state to meet with these candidates, is that correct?

A. Well, he would have had to, yah. I don't know if he had any other business in town, but I believe he lives in Madison, Wisconsin, so yah.

Q. In any event, you are aware that he came in from outside of Minnesota?

A. Sure.

. . . .

Q. . . . did you know of any NEA staff person who was involved in recruiting teachers or other individuals for these candidates . . . ?

A. The only one would be Mr. Vanderwoody who I asked one evening that he was here to telephone with me, and volunteer.

. . . .

Q. And where was this that the telephoning went on?

. . . .

Q. It was some campaign headquarters that Fraser people had set up? Not that MEA had arranged for?

A. Right.

Q. * * * and you and Vanderwoody telephoned to recruit people to work for Fraser?

A. NO. We just telephoned. I had recruited a number of individuals, and the Fraser staff had recruited other individuals, and I asked Dick if he'd help me. I believe it was two nights. The first night Dick was there all he did was look up telephone numbers and the second night I think he did some calling as a volunteer for Fraser.

.

Q. So Vanderwoody's connection with this was he was recruited by you to work for Fraser?

A. One night he looked up telephone numbers.

Q. From where, the telephone book?

.

A. Minneapolis telephone book * * *.

Q. * * * Why or how was it that you found yourself looking in the Minneapolis phone book for numbers of people?

A. Well, we had names of people and some addresses of people, but we didn't have the phone numbers or accurate phone numbers * * *.

Q. Where did you get the names and addresses?

A. Oh, Gees. Fraser people had some. I had some.

Q. Where did you get yours?

A. I had—let's see—okay. I had a list of teachers who had been elected delegates to county conventions of the DFL party.

Q. Where did you get that list?

A. It was my own personal list I had.

Q. . . . where did you get the data to put on the list?

. . . .

A. Teachers had sent it in.

. . . .

Q. And then you had compiled this list for your own use?

A. Yes. Right.

. . . .

Q. And then did you have any other lists?

A. . . . One of the volunteers, one of the teachers, had . . . a phone directory from her school district that the school district publishes. . . .

Q. And then with those lists you and Vanderwoody—well, first Vanderwoody went and tried to connect phone numbers with names?

A. When he was there that first day, that's what he did.

Q. And then the second day you were on the phone calling these people saying vote for Fraser . . . ?

A. . . . yah.

. . . .

Q. And then later you did something for Fraser on your own?

A. Yah.

Q. I mean without Vanderwoody?

A. Oh, sure. Sure. He just happened to be around then. [329]

The testimony of Investigator Saunders establishes that Bresin's story about the Fraser telephone-bank is a complete fabrication:

Q. [by Dr. Vieira, for plaintiffs] During the course of your stay at the telephone tree . . . did you have

any occasion to use local * * * telephone directories to try and find names of people to put on lists?

A. [Mr. Saunders] No.

Q. Did you happen to see at the telephone tree * * * a school directory or any other document that appeared to be a publication put out by some school in the Minnesota public school system listing names of teachers?

A. No.

Q. At the time that you were at the telephone tree * * * did you see or meet Mr. Ken Bresin there?

A. No. [330]

Even more compelling is Saunders' evaluation of Bresin's testimony:

Q. Mr. Saunders, did you have occasion * * * to read part of the deposition of Ken Bresin taken in this case?

A. Yes, I did.

Q. Specifically, did you have occasion to look at and review with some care pages 39 through 45 of that deposition?

A. Yes, I did.

* * *

Q. Well, let's get specifically to the language on page 42.

[counsel read text of page 42, Bresin deposition, into record]

Do you recall any occasions when Mr. Vander Woude performed tasks of the kind described in that part of the transcript, that is, looking up telephone numbers in Minneapolis telephone books?

A. Not while I was there.

Q. Then on page 43 of the transcript.

[counsel read text of pages 43-45, Bresin deposition, into record]

Finishing up on page 45. You have just heard me read that testimony into the record. Do you recall any instances in which Mr. Vander Woude, or anyone else, while you were at the telephone tree * * * used telephone directories to look up names of people?

A. No.

* * *

Q. Did you ever see a school directory?

A. No.

Q. Sir, in your experience at the telephone tree * * * do you believe that there was any need to look up people's telephone numbers? Did you ever have any need to do so?

A. No. Occasionally, you would catch a wrong number for some of these people. * * * There were so many reports [i.e., computer print-outs], you just went on to the next name.

Q. Having read and heard Mr. Bresin's testimony, and comparing it with what Mr. Bresin said to you about his participation in the phone bank, and comparing that to your own participation in the phone bank * * *, is there any way, in your mind, that you can reconcile these three different versions of what was going on at the time?

A. Well, for Bresin and Vander Woude to have been there two days together, it would have meant Vander Woude would have had to have been there three days, and it would have meant Bresin would have had to have been there Tuesday and Wednesday, and

Vander Woude would have been there Tuesday, Wednesday and Thursday. But Bresin told me he was only there Wednesday, Sunday and Monday. [331]

Other parts of Investigator Saunders' testimony support the conclusion that Bresin did not tell the whole truth. For example, if (as Bresin said), Vander Woude was merely a "volunteer" at the Fraser telephone-bank, he (Vander Woude) would have had no occasion to use a false name among the telephone-bank operatives, irrespective of what name he used when he solicited votes over the phone.¹¹⁰ Yet Saunders made clear in cross-examination that Vander Woude operated under the alias "Ryan" during the entire time that Saunders was with him at the campaign-facility:

Q. [by Mr. Miller, for defendants] When you first met Mr. Vander Woude, he was introduced to you as Dick Ryan?

A. [Mr. Saunders] I can't say for sure. I am not sure whether Peterson said this is—I know the name

¹¹⁰ As Saunders related, Vander Woude used the alias "Ryan" when making telephone-calls to voters.

Q. [by Dr. Vieira, for plaintiffs] During the course of your activities as a telephone bank operative, did anyone at any time suggest to you that you should use a name other than the one you were using?

A. [Mr. Saunders] No.

Q. But you heard Ryan making phone calls, didn't you?

A. Yes.

Q. What name was he using?

A. Ryan.

Q. He never used any other name, did he?

A. No.

Q. Did you hear Peterson making phone calls?

A. Yes.

Q. Did you hear what name he used?

A. I believe he used his own name. [332]

Vander Woude never was used. I don't know whether he said "This is Dick" or "Dick Ryan." I remember introducing myself as Jeff Saunders and shaking hands, and I am pretty sure he responded "Dick Ryan."

Q. Did you at any time after first shaking hands with Dick Vander Woude inquire of him as to who he was, who his employer was, how did he find himself to be in the telephone tree?

A. No. I assumed he was an MEA teacher. I made that assumption from the conversation. He would have participated in the conversation. I said "I am not a teacher. Is it all right to use this?"

The girl said "I am a nurse."

He was standing there and didn't say anything. It would have been appropriate for him to say "I am not an MEA teacher" also. [333]

The testimony of NEA Governmental Relations Consultant R. Dick Vander Woude also exposes Bresin's story as inconsistent with reality. Bresin, for example, did not say that either he or Vander Woude had served as an instructor for the telephone-bank operatives after Vander Woude had supposedly "volunteered" his services to the Fraser campaign. Yet Vander Woude testified that both he and Bresin had performed that role:

A. [Mr. Vander Woude] * * * I * * * discovered, upon getting to Minnesota, that Mr. Fraser was likely to lose the primary. So it was a matter of mentally shifting gears and talking about what they were going to do to turn out a favorable vote for the primary.

Q. [by Dr. Vieira, for plaintiffs] What was the substance of that discussion about the primary problem you perceived that Fraser had?

A. Well, that in this region of the State there was a great deal of apathy and that there was probably not going to be a sufficient voter turnout and what might be done to turn that around.

. . . .

Q. Are you aware of any follow-up activity * * * in which anyone from MEA participated for the purpose of helping Fraser get out the vote * * * ?

A. Yes. I spent some time with Ken Bresin in which we aided * * * the implementation of a phone bank operation in which we recruited NEA members to telephone other NEA members to encourage them to support Don Fraser and to vote in the primary.

Q. Now, how was it that you became part of this phone bank operation with Bresin?

A. Well, it happened that the timing of my trip here coincided with the implementation * * * of that effort, and I simply volunteered my services.

. . . .

A. I wrote the phone message, I prepared the tally forms, I wrote an instruction sheet for volunteer phoners, I helped the people to understand that instruction sheet and tried to make them feel comfortable with the process of calling someone they didn't know and communicating the kind of message that I believed would be most beneficial.

. . . .

Q. But people came into the telephone tree, and how did they know to go to you for information about an instruction sheet or how to use the phones or what list to use, everything that goes along with being a telephone bank operator?

A. Well, I think, like in most volunteers operations, people kind of come straggling in; I, or possibly Jeff

Peterson, * * * would have greeted people at the door. You know, "Here's the materials. Let me sit down with you and show you what's here. This is how to use it. Here's a phone list. Do you have any questions? Why don't we read through the message a couple times to see if it's comfortable for you?"

* * *

Q. * * * Was there anyone else in the telephone bank when you were there who was performing the function of an instructor * * *?

* * *

A. The first evening Ken Bresin was also there.

Q. And he was doing the same thing?

A. Essentially the same. [334]

Bresin, furthermore, did not reveal that he and Vander Woude had prepared materials for use in the Fraser telephone-bank, using MEA facilities and NEA financial backing. Yet Vander Woude testified, not only that that had happened, but that his entire participation in the Fraser telephone-bank get-out-the-vote drive was standard and proper operating procedure under the NEA's "Political Education Program":

A. [Mr. Vander Woude] This [Vander Woude Deposition Exhibit No. 5] is Instructions for MEA Phoners for Fraser. I believe this is the one I wrote.

Q. [by Dr. Vieira, for plaintiffs] Now, you'll notice at the bottom of that * * * there's an attribution, is there not?

A. Yes, NEA, and the date.

Q. Is there any reason why that's on there?

A. I normally put that on things that I do so I can keep track of it later.

Q. When did you prepare this thing?

A. The afternoon before it was used.

Q. Then it was produced in some number?

A. Yes.

Q. Who did the reproduction?

A. MEA Print Shop.

Q. How did it get over to the MEA Print Shop?

A. I gave it to them.

. . . .

Q. How was it that you could just go over to the MEA Print Shop and say, "Here. I'm Dick Vander Woude. I've got some material to print up. Print it up for me."

A. I worked for the NEA.

Q. They know you over there?

A. Sure. . . .

Q. What part . . . did Mr. Bresin play in the production of this document . . . ?

A. I don't really recall. He may have picked them up, his secretary may have taken them down. I just don't remember the specific details.

. . . .

Q. Is it part of your authority as an NEA Governmental Relations Consultant . . . to be able to volunteer the services of the MEA Print Shop in order to turn out materials such as Exhibit No. 5?

A. I've never asked myself that question.

Q. Apparently they've never asked the question in the MEA Print Shop, have they sir?

A. No, sir.

Q. In the sense that no one came to you and said "Why should we do this?"

A. No. I think it's relatively standard that a state affiliate . . . cooperates with someone who works for the national.

. . . .

A. . . . I later received a bill for it and forwarded it to Washington. . . .

Q. . . . When you say to Washington, you mean to the Governmental Relations Department?

A. The Governmental Relations Department, with a request to pay it.

Q. Request to pay MEA.

A. Right.

. . . .

Q. To whom did you forward this in Washington?

A. I would assume Harman.

. . . .

Q. To pay a print bill?

A. Yeah. I route all campaign things through his office; whether he ever sees them or not, I don't really know. . . .

. . . .

Q. Why didn't the Fraser people pick up the tab for this Exhibit No. 5?

A. I didn't ask them to.

. . . .

A. I never gave the question any thought. I wrote it, I was at the MEA Building, it needed to be printed, I did it the most expeditious way available to me.

Q. Did you write that at the MEA Building?

A. Either then or in the car on the way over.

Q. Who typed it up?

A. I believe the IMPACE clerical person.

Q. Kristin Kendall?

A. Yeah, I believe Kristin.

Q. Did you have any discussion with Mr. Bresin with respect to what should go into this Exhibit No. 5 in the course of . . . the write-up?

A. I'm sure that after I wrote it I handed it to him to see if he had any feelings about whether it would meet the needs of the kinds of people who might be involved in doing the call work.

Q. So he was aware that you had written it?

A. Yes.

Q. He was aware that you had given it to Kristin Kendall, had it typed?

A. Yes.

Q. Was he aware that it was printed up in the MEA Print Shop?

A. Yes.

. . . .

Q. Who brought these things over, Exhibit No. 5 and its counterparts?

A. I don't recall if I picked it up and brought it over or he did.

. . . .

Q. What part of those two and a half days that you were here in Minnesota prior to the primary election was involved with NEA business and programmatic activities?

A. . . . all of the things that we have previously discussed. Meetings with Bresin and conversation with Mammenga, the writing of the phone message, the assistance to telephoners.

Q. So all the activity in the telephone bank you believe was properly billable or attributable to NEA in some sense?

A. Yes.

. . . .

Q. What program activities specifically. Is there a name for that program?

A. Political Education Program. [335]

Besides implicating Bresin in a series of untruths and half-truths, Vander Woude's testimony indicates that he, too, attempted to conceal material facts from plaintiffs and this Court. For example, Vander Woude repeated Bresin's story about the two of them "looking up numbers in the telephone book":

Q. Now, in the course of your activity at the telephone bank on either of the nights, was it one of your duties to take . . . a school directory . . . and to go to the phone book . . . of the Phone Company, and pull numbers out of that to match them up with names? . . .

A. . . . I believe there was another list from a school directory that I spent some time looking up members on.

Q. . . . you would fill in when you found a number that was different?

A. Sure. [336]

Investigator Saunders, however, exploded this unlikely tale on cross-examination by defendants' counsel:

Q. [by Mr. Miller, for defendants] Mr. Saunders, you have testified that you never saw any other materials being accessed for purposes of making the telephone calls other than the computer printout; is that correct?

A. [Mr. Saunders] And the precinct caucus list.

Q. And you have also testified that in regard to Mr. Vander Woude specifically, you never saw him accessing any public telephone directories or school telephone directories.

A. No.

. . . .

Q. So it's entirely possible, is it not, that Mr. Vander Woude could have been accessing public telephone books, school directories, any other number of sources, to come up with names that you did not observe?

. . . .

THE WITNESS: It's possible, but it would mean that either Bresin or Vander Woude were lying in their testimony.

BY MR. MILLER:

Q. Apart from that. It is certainly possible.

A. It's possible, sure.

Q. In addition, it's certainly possible that there were other documents or sources being referenced to make telephone calls by any of the individuals making the calls. You didn't go through their cubicles personally to see what they were using.

A. I did see everyone's cubicle. There was a great deal of material on Peterson's desk, but I don't know what it was. I was standing there with Vander Woude, looking over his shoulder, while he was making the telephone calls. The only material he was referencing

from was the script and the legislative detail [i.e., computer print-out].

Q. Then you went over to make telephone calls on your own in your own cubicle. You did not have Mr. Vander Woude under surveillance the entire time.

A. But I was on the other side of a thin partition making calls.

Q. But you don't know whether he referenced any other materials in the when you were not in his presence.

A. I can say for a fact he did not reference any telephone book, because there were none.

Q. But you don't know whether he did reference any materials beyond telephone books.

A. I can't say how he produced them. If he did, it came out of his pocket.

Q. Or out of a briefcase.

A. He didn't have a briefcase.

Q. You observed him that closely.

A. I was in the cubicle with him, standing right over his shoulder.

Q. And you are certain he had not briefcase anywhere else in the room?

A. Then he would have stood up, and he is so tall you would have seen him over the top of the partition.

Q. You had him under surveillance, so you knew he didn't stand up during the entire course?

A. Everyone would take a break during the calling, and I would take a break. That's when I had my discussions with these people.

. . . .

A. . . . It's possible, but improbable that he did produce it from somewhere.

Q. Based on your observations?

A. Yes. [337]

Saunders explained further on re-direct examination:

Q. [by Dr. Vieira, for plaintiffs] Mr. Miller questioned you on the possibility of Mr. Ryan having used telephone books to collect phone numbers, or having used other lists of people in the course of his calling activities . . . is that correct?

A. Yes.

Q. If you look at Deposition Exhibit No. 3, how many names are on that particular computer sheet?

A. Twenty-four.

Q. How many sheets, approximately, of computer print-outs of that kind were available at the telephone bank . . . ?

A. Let's say a hundred.

Q. So possibly there were as many as 2400 names available to the callers at that phone bank . . . ?

A. That's correct.

Q. How many callers were there?

A. Four.

Q. How long do you think it would take those four callers to go through all the names on that listed print-out by the computer at the rate they were working?

A. It took me an hour to go through one page.

. . . .

Q. From your expertise in the phone bank, do you think it would make any sense for someone to go labori-

ously through some Minneapolis phone book to collect phone numbers?

A. . . . most numbers were correct. There were a few that didn't have numbers. Very rarely you would get a wrong number, or occasionally you would hit one that had a new number, and you would dial the new number.

Q. . . . didn't you understand . . . that your purpose in being a telephone bank operator was to call as many people as possible in as short a period of time?

A. Yes, it was.

Q. Then if you ran across a number . . . that didn't answer or wasn't operating, you went on to the next one?

Q. I was told to make a notation so nobody would call that.

A. Certainly nobody suggested you should keep on that?

A. . . . I was told if you reach a busy number or nobody is home, just keep on going; just make a notation on the side you did not reach that person. [332]

In short, Bresin's and Vander Woude's testimony about "looking up telephone numbers" to match with "school directories" and "personal lists" is nonsense. In situations where an effective get-out-the-vote drive appears crucial to the success of their candidate, experienced political campaigners do not establish telephone-banks using scratch-lists of names, or searching local directories for telephone numbers at the last minute—particularly when they have available at their finger-tips hundreds of sheets of computer print-outs, containing thousands of names and numbers.

Equally incredible is Vander Woude's assertion that he did not know who had supplied the computer print-outs:

Q. [by Dr. Vieira, for plaintiffs] Where did you get
• • • the computer printout? Who gave it to you?

A. [Mr. Vander Woude] It was there that evening.
I think Jeff had it.

Q. Did he tell you where he got it?

A. No.

Q. Do you recall what was on the list in terms of
what kind of information was on it?

Q. Names and addresses of MEA members.

• • • •

Q. [Vander Woude Deposition Exhibit No. 4] says
"Minnesota Education Association Member Detail
Legislative Report," dated 2/4/78, Page 460.

• • • •

Q. Does that look like the type of thing that you were
using in the telephone bank on the night or nights in
question?

A. Yes.

• • • •

Q. Did anyone ever explain to you where • • • Ex-
hibit No. 4 came from? • • •

A. No.

Q. Have you ever seen material similar to Deposi-
tion Exhibit No. 4 out of the MEA offices? • • •

A. Well, a computer printout of a list of names are
so common that I can't say that I have or I haven't.
• • • I don't know if I've seen it at the MEA or other
states within NEA. That's pretty standard. You ask
for an alphabetical list of people in a given area, and
that's the way it looks. [338]

If the computer print-out bore the title "Minnesota Edu-
cation Association Member Detail Legislative Report",

and listed the names, addresses, telephone numbers, and other information in respect of MEA members, it is unlikely to have been some list prepared by the Democratic Party, by Donald Fraser's campaign-staff, or, indeed, by anyone other than the MEA itself. And, therefore, it is unlikely to have come from any source other than the MEA itself—which Vander Woude and Bresin, experienced UTP staff-men, must both have known.

Even more incredible than Vander Woude's claim of ignorance on this score, was his and Bresin's characterization of his involvement in the Fraser telephone-bank as a "volunteer" who just "happened" to be there. In critical elections, experienced campaigners such as the Fraser staff do not depend on happenstance volunteers to set up vitally needed get-out-the-vote drives at the last minute. Yet that is what Vander Woude and Bresin implied. Moreover, Vander Woude's own testimony indicates that his role was that, not of a simple rank-and-file volunteer, but instead of an organizer and supervisor.

For example, Vander Woude estimated the cost of the various materials he requested the MEA Print Shop to produce:

Q. [by Dr. Vieira, for plaintiffs] How large was the bill in monetary terms?

A. [Mr. Vander Woude] \$180.

. . . .

A. That's an estimate.

Q. Okay. It's an order of magnitude as opposed to 170 or 190.

A. Yeah. [339]

The testimony of MEA Assistant Executive Director of Communications Kenn Pratt puts this \$180 figure in perspective:

Q. [by Dr. Vieira, for plaintiffs] * * * are you familiar * * * in what it costs to do certain kinds of jobs in the MEA print shop?

A. [Mr. Pratt] We have a policy governing certain aspects of printing that we do * * *. There are charges that we set forth.

Q. * * * If someone * * * wanted to turn out an eight and a half by eleven flyer, print it on one side with eight or ten lines of type, how many of those do you think you should be able to turn out of the MEA print shop for between a hundred and fifty to two hundred dollars? * * *

. . . .

THE WITNESS: * * * I don't know what paper they would use, but say they used twenty pound, five hundred sheets to a ream, it runs somewhere around probably \$3.00, \$3.25 per ream.

Q. Well, approximately how many of those sheets * * * would you expect to get for a hundred and fifty dollars? * * *

. . . .

A. Well, do you want me to figure it out? \$3.00 per ream, hundred and some dollars. How many times does \$3.00 go into a hundred and some dollars? * * *

[340]

Thus, according to Pratt, for \$180 dollars the MEA print shop could have produced (and if they billed for it, did produce) approximately fifty reams of the materials Vander Woude supplied to the Fraser campaign: that is, somewhere in the neighborhood of twenty-five thousand sheets. Since not all—or even many—of these sheets were used in the campaign-facility Investigator Saunders infiltrated, a large number must have gone elsewhere.

The evidence suggests that Vander Woude and the MEA produced these materials, not simply for one telephone

bank with a handful of operatives, but rather for a network of such banks with many operatives. After all, Vander Woude testified that the Fraser campaign faced defeat because of voter-apathy, and that a get-out-the-vote drive appeared crucial. Such a drive mounted from a single, small telephone-bank could not be effective. Which implies that Vander Woude's role, the role of an "election pro", was to provide appropriate materials for the entire get-out-the-vote campaign, and (from time to time) to supervise activities at one or another of the Fraser campaign-facilities—in one of which, more or less by accident, plaintiffs' private detective found him.¹¹¹

Vander Woude's story about providing his services to the Fraser campaign as a "volunteer" is shot through with inconsistencies and contradictions. First, as mentioned above, Vander Woude admitted that his activities related to the telephone-bank were billable and attributable to the NEA's "political education program", not simply to him as a private citizen. Second, Vander Woude also admitted that, in support of his campaign-activities, he employed the services of the MEA print shop. Under what circumstances, and according to what UTP organizational policy, the MEA print shop can "volunteer" its services to candidates, though, Vander Woude did not say.

Vander Woude did deny that he acted in concert with Bresin and Mammenga, or under advice from NEA coun-

¹¹¹ This is just one example of how plaintiffs have discovered crucial evidence only by discounting defendants' repeated denials, disbelieving the testimony of their staff-personnel, disregarding their non-production of documents—and taking direct action, at great expense, to uncover the truth that defendants have striven improperly to conceal. The Federal Rules of Civil Procedure, however, were written to relieve a discovering party from such a burden by requiring the party from whom discovery was sought to make admissions of fact, to give frank testimony, and to produce relevant documents—not to allow the latter party to "stonewall" and cover-up until exposed by private detectives.

sel, to perform campaign-related tasks that Bresin and Mammenga could not openly perform because of the instant case. But his denials the record belies.

Q. [by Dr. Vieira, for plaintiffs] Did you have any conversations with respect to whether or not Bresin, Mammenga or other MEA staff people might or might not become involved in the campaigns of the candidates themselves?

A. [Mr. Vander Woude] No, there wouldn't be any reason to.

Q. Did you have any conversations with Bresin or Mammenga about whether any NEA staff people might become involved in any way in the campaigns of candidates in the '78 Minnesota elections?

A. No.

. . . .

Q. Sir, prior to the primary elections of September 12, 1978, did anyone connected with the NEA request or counsel, order you as an NEA Government Relations Consultant to come into Minnesota to perform the function of a campaign organizer of MEA members?

A. No.

Q. If Mr. Bresin had testified that, in fact, that was your role, . . . would that testimony be in any way correct?

A. I don't believe so.

. . . .

Q. Sir, isn't it in fact true that one of the reasons that you came to Minnesota prior to the primary elections in 1978 was to aid at least Candidate Donald Fraser's campaign in organizing a phone bank because someone had informed you that MEA staff personnel,

Mammenga, Bresin, or others, could not perform that task themselves because of the pendency of this lawsuit?

A. No, that's not true. [341]

Actually, of course, Bresin had not "testified" as to Vander Woude's role, or the role of what Bresin called "NEA's attorneys" in the activities of himself and Vander Woude. Rather, he had made statements under circumstances in which candor on his part was far more likely than in the testimony he gave under oath in this case. As Investigator Saunders recounted:

A. [Mr. Saunders] * * * I constantly have to evaluate people in the course of my job. I am usually a front runner for attorneys' suits. So it's important for me to interview witnesses, and more importantly, to evaluate that witness to the attorney. That involves a lot of subtleties as to the individual's mood, whether he is telling the truth, or whatever.

Q. [by Dr. Vieira, for plaintiffs] In the course of your conversations with Mr. Bresin * * *, generally speaking, what were your perceptions as to Mr. Bresin's candor and frankness?

A. He was quite frank. He was relaxed. The only time he became guarded in his speech is when I asked him who was doing the organizing. He hesitated for a second before saying the NEA regional director. [342]

Bresin, then, was "frank" and "relaxed"—and "hesitated for a second" only when he told Saunders about the mechanism of the UTP cover-up. Yet he did explain that mechanism and the reason for it:

A. [Mr. Saunders] He said he [i.e., Bresin], personally couldn't do anything, that his hands had been

tied, that because of the lawsuit with the National Right to Work Foundation, NEA's attorneys had advised him not to get involved.

Q. [by Dr. Vieira, for plaintiffs] Now that's the phrase he used or term he used, "NEA's attorneys"?

A. Yes, he did.

. . . .

A. I said, "Well, if you yourself cannot do the organizing, who is doing it?"

He said, "Well —" he kind of hesitated for a second. He said, "Well, the NEA regional director was coming in and —"

Q. That was his term, the NEA regional director?

A. Right. I asked him who the NEA Regional director was, and he said—he identified him as Dick Vander Woude [343]

What motive Bresin could possibly have had to tell Saunders what he did—other than that he believed Saunders to be friendly to the UTP, and wanted candidly to explain the basis for his own relative inactivity in the 1978 elections—is obscure. A more plausible interpretation of the facts than that Bresin was lying to Saunders—to whom he spoke face-to-face, in the privacy of his office—is that Vander Woude was lying in his testimony when he denied the existence of a cover-up. This interpretation also reconciles another of Vander Woude's deposition-statements that Investigator Saunders' testimony proves false:

Q. [by Dr. Vieira, for plaintiffs] Had anyone ever explained to you what the ramifications of the Knight case might have been with respect to the theories of the case or lines of investigation that were going on in the case?

A. [Mr. Vander Woude] Not in any usable way before last evening [i.e., 19 November 1978]

Q. Did someone explain that to you last evening?

• • •

A. Eric Miller [i.e., counsel for defendants]. [307]

Vander Woude, however, was quite aware of this case, and its implications, long before Sunday, 19 November 1978. Investigator Saunders recounted a conversation with him in the Fraser telephone-bank:

A. [Mr. Saunders] • • • I did try to talk to him [i.e., Vander Woude] • • • I did ask him about the distinction between the MEA and IMPACE. That's when he mentioned the suit. He was not a very cooperative individual. He was very cooperative in explaining what to do. When I tried to talk to him about other things, he wasn't. He mentioned the suit that had been going on.

I said, "This must be getting in the way of a lot of people."

He said, "Yes, a lot of people wish it was over," and then he mumbled incoherency.

Q. [by Dr. Vieira, for plaintiffs] He was the one who brought up the existence of this lawsuit?

A. Yes. [344]

Both Vander Woude and Bresin tried to obfuscate matters further by referring to a supposed "MEA policy" against the organization's staff-personnel working in candidates' campaigns.¹¹² First, Bresin explained the "policy":

¹¹² The existence of this "policy" first became the subject of sworn testimony in the deposition of IMPACE Chairman Roger Johnson. [345] As Part IV.D., *infra* pp. 313-18, shows, Johnson's truthfulness is not above question.

Q. [by Dr. Vieira, for plaintiffs] What is that policy?

A. [Mr. Bresin] That we aren't to be involved as MEA staff members in partisan politics.

Q. Now how to do you mean, not to be involved?

A. I mean not to be working for any candidate as an MEA staff member.

Q. When did that policy come into effect?

A. Gees, it's been around for a long time. . . .

. . . .

Q. Have you ever seen a written statement of policy with respect to the campaigns of candidates in public office?

A. I don't recall if I have. I have, you know, been directly told that both by Mr. Gallop [MEA Executive Director] and Mr. Mammenga, both while I have been in this position and prior to that

. . . .

Q. . . . before November, 1977?

A. Oh, sure.

Q. And subsequent to November, 1977 . . . they also told you this?

A. Sure.

. . . .

Q. . . . one thing that you believe this policy precludes is you going and working in the campaign headquarters of a candidate?

A. Certainly.

Q. What else?

A. You know, I don't know. To me it would preclude me from, you know, all political activity as an

MEA staff member, you know, on MEA time, related to a specific campaign, and, you know, it's just simply that clear. That there is nothing, you know, that is permitted. . . .

Q. . . . Does that cover NEA people too? That is, was it against MEA policy for this man [i.e., Vander Woude] from your affiliate, the NEA, to come into Minnesota and involve himself with an assessment of campaigns?

Q. . . . in the course of all the information you have picked up about this policy, whatever it is or wherever it came from, are you aware that the policy, as you understand it, covers activity by NEA people?

A. I don't know. I don't know. [346]

Several things stand out as peculiar in this explanation of the alleged "MEA policy". (i) If such a "policy" against (as Bresin said) "all political activity as an MEA staff member . . . on MEA time" did exist; and if Gallop and Mammenga had communicated that policy to Bresin time and again prior to the September, 1978, primary election; then there would have been no need for "NEA's attorneys" to "tie his hands" because of the pendency of this case (as Bresin told Saunders). (ii) If such a "policy" did exist in September, 1978, its inapplicability to the services of the MEA print shop is inexplicable. For the printing of thousands of pages of get-out-the-vote materials for use in a telephone-bank established by a candidate's campaign, with the aid and concurrence of MEA staff-persons Bresin and his assistant, Kristen Kendall, is self-evidently a political activity within what Bresin testified the "policy" does not permit. (iii) If this "policy" did exist in September, 1978; and if it was as strict as Bresin described; then Bresin was remarkably remiss in

his duties to the MEA not at least to inquire of his superiors, Mammenga or Gallop, as to the propriety of Vander Woude's activities in relation to the Fraser telephone bank. For, as Vander Woude testified, *he* never doubted that his activities were attributable and billable to the NEA under its "political education program", and therefore were the activities of an NEA staffman, on NEA time, serving NEA objectives.

A more plausible conclusion than that the "policy" Bresin described exists, or ever existed, is that defendants have followed a policy of attempting to cover up the activities of their "election pros" throughout this case. Again, the testimony of Investigator Saunders substantiates this interpretation:

Q. [by Dr. Vieira, for plaintiffs] Now that's the phrase he [i.e., Bresin] used or term he used, "NEA's attorneys?"

A. [Mr. Saunders] Yes, he did.

Q. Advised him not to get involved in what?

A. In elections, on company time. He said as a consequence, he has had to work on behalf of Fraser on his own time, after 4:30 p.m. And then he told me . . . that he had worked the telephone tree. I mentioned to him I worked the telephone tree. He told me he, himself, had worked the telephone tree on Wednesday, Sunday and Monday . . .

. . . .

A. . . . And I said, "Well, that's a lot of work. Are you compensated for this?" He kind of laughed and said no. . . . [347]

"As a consequence"—not of any MEA "policy" against political activism by staff-personnel on MEA time—but rather of advice from "NEA's attorneys" in connexion

with this suit, Bresin limited his own involvement in candidate's campaigns, leaving the main tasks to Vander Woude (alias "Dick Ryan"). This alone explodes Bresin's testimony on the MEA "policy".

Vander Woude also testified that he was aware of the supposed MEA "policy":

Q. [by Dr. Vieira, for plaintiffs] Has either of those individuals [i.e., Mammenga or Bresin] ever informed you that the Minnesota Education Association has a policy * * * with respect to participation by its staff people in campaigns of candidates for public office?

A. [Mr. Vander Woude] Yes.

Q. Who was it that told you?

A. I think it's probably a topic of conversation I've had with both of them.

Q. What did they say was the substance or import of this policy * * * ?

A. The MEA staff does not participate in partisan elections.

. . . .

Q. How does that restriction operate, other than as an admonition?

A. Well, as a person who would like to have good organizational staff resource to organize teachers, I have always found that that admonition is followed with great rigidity, and I just don't—I think that staff assistance to partisan campaigns in Minnesota is virtually non-existent, other than the IMPACE contracted time. [348]

Except, of course, for staff-assistance from the MEA print shop in turning out telephone-bank materials for a UTP "election pro" from outside Minnesota who used those

materials in a get-out-the-vote drive in campaign-facilities established by a candidate for election to public office.

Inferences from the testimony of Letorney, Saunders, Bresin, and Vander Woude are not difficult to draw: *First*, the similarity of the participation in candidates' campaigns by Letorney (in 1976) and Vander Woude (in 1978) is not accidental. Instead, it reflects the long-established and consistent UTP policy of supplying "election pros" to organize, supervise, and assist campaign-workers drawn from the ranks of UTP members.

Second, since at least the Letorney deposition, defendants have implemented a scheme whereby MEA staff-personnel have circumscribed their open campaign involvement so as to give the appearance of inactivity and lend credence to defendants' belated claim that the MEA has a "policy" proscribing political activism on the part of its staff-personnel.

Third, to promote the campaign of a favored candidate in Minnesota during the 1978 elections, notwithstanding the fraudulent MEA "policy" and the relative inactivity of MEA staff-personnel, the UTP relied upon an "election pro" from outside the State to supervise a get-out-the-vote drive under an assumed name.

Fourth, this scheme was known to, had the concurrence of, or derived directly from the "NEA's attorneys".

Fifth, when confronted with plaintiffs' knowledge of their scheme, defendants' staff-personnel testified falsely under oath, according to the line defendants have adopted from the commencement of this action. And,

Sixth, had plaintiffs not diligently tracked down the "election pro" through the use of private investigators, defendants' scheme of profiting politically from the campaign-involvement of their staff-personnel, while simul-

taneously concealing that involvement from or misrepresenting it to plaintiffs and this Court, would likely have succeeded.

C. CERTAIN OF DEFENDANTS' STAFF-PERSONNEL HAVE NOT TOLD THE WHOLE TRUTH ABOUT THE EXTENT OF INVOLVEMENT OF UNITED-TEACHING-PROFESSION MEMBERS IN THE CAMPAIGNS OF CANDIDATES FOR ELECTION TO PUBLIC OFFICE.

An important factual issue in this case is the extent and nature of involvement of UTP members as campaign-workers on behalf of candidates for public office. Although UTP publications and leaders boast of the substantial participation by the organization's rank-and-file in campaign-activities, defendants have refused to admit that the UTP solicits, recruits, mobilizes, organizes, trains, and assists significant numbers of its members to perform campaign-services. [349] Certain of defendants' staff-personnel have also given false or incredible testimony on this matter.

NEA-GRD Assistant Director Robert Harman, for example, claimed that he had never tried to establish the extent of UTP members' involvement in campaigns:

Q. [by Dr. Vieira, for plaintiffs] * * * I am talking about hard data with respect to the number of staff people or rank-and-file members who have involved themselves in activities relating to the election of candidates for public office, such as get-out-the-vote drives.

Have you ever investigated the existence of hard data at the state and local level—

A. [Mr. Harman] Not that I can recall. No.

Q. This "not that you recall" covers a period of how long, going back to when?

A. 1972.

Q. From 1972, '74, '76, '78, those four elections, you, Robert Harman, never investigated in any way the existence of hard data with respect to the involvement of staff or members of the state or local affiliates of the NEA in candidates' campaigns?

A. True.

Q. And the Governmental Relations Department of the NEA, as far as you know, in '72, '74, '76, '78 elections never made any such investigations; is that correct?

A. I don't recall any. [350]

Harman's alleged lack of interest in or recollection of the campaign-activity of UTP members extended as well to the crucial 1976 Carter-Mondale election:

Q. During the Carter-Mondale campaign, were you aware of activities on the part of NEA governmental relations staff working with staff of state NEA affiliates in attempts to recruit or enlist teachers to volunteer in get-out-the-vote or other campaign activities aimed at supporting Carter and Mondale?

A. I don't recall any.

Q. You mean the governmental relations consultants never informed you throughout the course of, or after, the Carter-Mondale campaign that they had been involved in any activities whatsoever . . . aimed at encouraging teachers to become volunteers . . . ?

A. They may have. I don't recall.

Q. What do you mean they may have? You mean they may have told you that.

A. I would consider that would be something they might be involved in, yes. I just do not recall.

Q. And, to your knowledge, no one attempted to make some sort of survey or investigation of the extent to which the governmental relations consultants * * * had been involved in that kind of activity?

A. None that I am aware of.

Q. During the course of the Carter-Mondale campaign, were you aware of activities in any state or local affiliates of the NEA directed towards recruiting or enlisting UniServ staff people for the purpose of those individuals * * * recruiting teacher volunteers?

A. I am not.

Q. Did you ever investigate that question, ask anyone about it, to what extent they [i.e., UniServ staff-personnel] were involved in encouraging people to become volunteers for Carter and Mondale?

A. No. [351]

Harman also claimed ignorance of specific facts regarding electoral matters reported in the UTP's national-level newspaper, the *NEA Reporter*:

Q. * * * [referring to Harman Deposition Exhibits Nos. 26-33] there seems to be a consistency * * * running through these Reporters, one that teachers, NEA members, have been volunteering in various places in the country to work on behalf of candidates * * *; and two, that apparently the NEA Reporter knows enough about it to write these stories with pictures of candidates with quotations from the candidates with details about what went on in the campaigns, how many volunteers there were and what they were doing. * * *

* * * your testimony here is that you don't know very much about teachers volunteering for campaign work, nobody reports to you, nobody tells you anything specifically about it, and yet these Reporters are full

of knowledge about it. Where do they get their information? * * * how is it they know so much about the role teachers play in the campaigns of candidates for public office from 1974 through 1978, the last three elections?

. . . .

A. Some of the information would have come from Howard Carroll's communications staff in the governmental relations, who would have gotten it from one of the political consultants.

Q. Well, if Mr. Carroll is receiving this information from the regional political education consultants, information detailed enough to enable the NEA Reporter to produce the stories that appear in the various deposition exhibits * * *, why is it that you are so lacking in knowledge about the activity of teacher volunteers at the state and local level? These people are your subordinates; they are not Mr. Carroll's.

A. That is true.

Q. Why don't they report their information to you or why haven't they been doing it?

. . . .

A. Because they have been instructed by me to provide Mr. Carroll with that information.

Q. But you have never been curious about what that information is?

A. I feel I know in a general sense what the information is. I don't know all about the specific races; as a matter of fact, very few of them.

. . . .

Q. * * * your specific knowledge of these races is more or less limited to what you may have picked up from the NEA Reporter?

A. No.

Q. What other knowledge do you have " * * * ?

A. Information that I may have received throughout the course of the various campaigns.

Q. What is that, sir? * * * somebody happens to tell you something * * *, and if they don't tell you, you continue to go blindly on not knowing anything?

A. I don't agree with the characterization "happens to tell you," but no; I don't receive information about each and every race.

Q. What about particular races and the extent to which teachers are or are not volunteering * * * ?

A. On occasion.

Q. Can you think of any particular races?

A. No. [352] ¹¹³

And finally, Harman testified that he knew nothing about state-level efforts of the UTP to determine how many of its members served as campaign-workers:

Q. * * * do you have any knowledge whatsoever about activities of state NEA affiliates with respect to the

¹¹³ Harman's reference to one Howard Carroll and others as persons knowledgeable about electoral matters of which Harman claims ignorance is apparently part of any other of defendants' devices to frustrate full disclosure: *viz.*, deponent X says that Y knows; deponent Y then identifies Z; and so on. When Z finally testifies, he has a convenient lapse of memory. The testimony of McFarland, Baker, Harman, and Lowell show this tactic at work.

The "pass-the-buck" ploy can be effective, however, only (i) if defendants can withhold documents from production that establish the involvement of X, Y, or Z in some activity; and (ii) if defendants can count on some arbitrary termination-date for discovery.

collection of data about NEA members who have been
 • • • involved in campaigns • • • ?

A. No. [353]

More incredible yet than this testimony was Harman's assertion that his supposed ignorance—and, indeed, the lack of the information itself—was a satisfactory state of affairs:

Q. So it is your testimony there has been • • • no systematic efforts on your part or on the part of consultants to provide you or the Governmental Relations Office with detailed assessments or analyses • • • ?

A. I think that is essentially true.

Q. That information is not available except when
 • • • someone can remember a verbal conversation?

A. That is true.

Q. Do you know any reasons why that information is not maintained or collected? You just don't seem to care?

A. I don't see that it is terribly useful.

• • • • •

Q. • • • Doesn't it strike you, looking at this information [in Harman Deposition Exhibit No. 11], that this would be rather valuable • • • the names of Uni-Serv contacts and the names of state associations who were effective leaders in political actions, names of contacts and all sorts of general comments about the good and bad points of campaign activity • • • ?

A. No.

Q. Why not?

A. Because it didn't give me anything to use for the future to improve what we are doing.

Q. The names given * * * specifically identified as [UTP] members who were leaders in this effort. That wouldn't give you information you could use?

A. Not for me.

Q. How about the governmental relations consultants themselves?

* * *

Wouldn't that be a reason for maintaining this type of information in a central location that governmental relations consultants might use * * * ?

A. * * * I think it would be useful * * *. But I don't see a need to maintain that at NEA headquarters.

Q. * * * is that because you understood that information of the type * * * in Deposition Exhibit 11 is, in fact, being maintained by governmental relations consultants in various locations * * * ?

A. No.

Q. Do you know that is the fact, they are maintaining such information?

A. No.

Q. Have you ever had any interest in checking that out?

A. Yes.

* * *

Q. What was the result?

A. They weren't.

Q. And you simply sat back and said that is fine, all this useful information is not being collected, excellent, gentlemen, we give you a red star in your performance evaluation? * * *

A. I didn't know we were talking about regional specialists, I thought we were talking about state people keeping it.

Q. No. The regional GR people, your subordinates. Did you ever have any interest in determining whether they were maintaining this type of information?

A. No.

Q. Never asked them?

A. No.

. . . .

Q. Are you aware the state organizations were maintaining data of the kind shown on * * * Exhibit 11?

A. No.

Q. So you are not aware anyone is keeping this kind of information?

A. That is true.

Q. And you think that is a good thing * * * ?

A. No, I don't.

Q. Have you taken any steps to correct the problem * * * ?

A. No.

Q. So there is a difficulty * * * and you are just sitting on your hands doing nothing; is that correct?

A. No.

Q. What are you doing?

. . . .

A. Nothing. Because I don't think that should necessarily all be collected.

Q. Any of it? Are you doing anything to see that any of that data are collected * * * ?

A. There is no formal program to do that.

Q. Is there an informal?

A. * * * a regional governmental relations specialist would be expected * * * to encourage states to do that * * * .

Q. How long have these regional governmental relations specialists been encouraging states to do that?

A. * * * three or four years, maybe five.

Q. * * * have you ever received feedback from them or the states as to whether the states * * * have gone forward to take steps to collect the information?

A. Nothing that is countable. It would have been informal things like, yes, a certain state is doing this, * * * or setting up these files.

Q. That is what I mean. * * * the existence of systematic collection of data.

A. But they weren't doing it.

Q. What?

A. You said if I received that kind of information, and I recall in one case I did * * * .

* * *

A. That state was Missouri.

Q. They were collecting data?

A. That was the information I received. They were not.

Q. Did you ever receive information with respect to states that were?

A. No.

Q. You knew that Missouri was not, and knew nothing about any other states, and what did you do under those circumstances? Did you say that is fine, I know Missouri is not, and other states, I don't know and, therefore I am happy?

A. Yes.

. . . .

Q. So your knowledge about the entire operation of the governmental relations departments in all the NEA state affiliates is, with the exception of Missouri, with respect to the collection of political information, is exactly nothing; is that correct?

A. Yes. . . . [354] ¹¹⁴

Harman's "blissful ignorance" of the involvement of UTP members in candidates' campaigns is not only incredible on its face, but also inconsistent with NEA-GRD Director Stanley McFarland's testimony. McFarland admitted, for example, that the UTP collected data both on unspecified congressional campaigns and on the Carter-Mondale campaign:

Q. [by Dr. Vieira, for plaintiffs] . . . has the NEA . . . over the last four to six years ever made any evaluations . . . of the extent to which NEA members are . . . serving as teacher volunteers for candidates for election to public office?

A. [Mr. McFarland] I think we have requested that information from our state and local affiliates on one or two occasions.

¹¹⁴ Because of the willingness of people such as Harman to give incredible testimony of this kind, plaintiffs have requested that further depositions of these individuals be taken before a magistrate who can judge their lack of credibility on a face-to-face basis. Motion para. E., p. 29.

Usually after congressional campaigns * * * we are always interested because the press always asks * * * how many teachers were involved in those kind of campaigns * * * ?

Q. Subsequent to the Carter-Mondale campaign, was there an attempt made to analyze * * * the role of teachers as campaign volunteers * * * ?

A. I think we tried to find out how many teacher volunteers * * * were active in the Carter campaign.

Q. How did you go about doing that?

A. Made a request, I think, through our state affiliates if they had information.

Q. Who made the request from NEA?

A. I don't remember. * * *

. . . .

Q. Are you aware of any return of information * * * ?

A. Not specifically. I am sure there was some return, but again, like a lot of other things, it was probably very spotty.

Q. Was there a report * * * of this information prepared * * * ?

A. I think we came up, probably with some round numbers, and offhand, I don't remember who they were given to * * *. [355]

Even more revealingly, McFarland testified as to information on UTP members' involvement in two specific congressional campaigns:

Q. What is the substance of these two letters [in McFarland Deposition Exhibit No. 42]?

A. We had a NEA-PAC meeting * * * and as a part of the program we invited several members of Congress * * * to talk about the role that teachers played in their campaigns.

Q. How did you know in these two particular instances teachers had played a role in the campaigns * * * ?

A. From reports we had received from our state affiliate and regional people. [356]

NEA Communications Director Susan Lowell also contradicted Harman's alleged ignorance about political reports in the UTP's national-level newspaper:

Q. [by Dr. Vieira, for plaintiffs] * * * Here is * * * Harman Deposition Exhibit No. 26. * * * it begins with a banner headline "Teacher-Politicians 1976."

* * *

This is an example of what I mean. The NEA Reporter is produced by people in the Communications Department, isn't it?

A. [Mr. Lowe]¹¹⁸ Yes.

* * *

Q. Who in the Governmental Relations office provides information of that type to people connected with Communications?

A. That would vary considerably. I would guess Mr. Harman provides, primarily. [357]

And further documentation of Harman's false testimony on this matter plaintiffs have already provided.¹¹⁹

Harman was not the only deponent who refused to tell the whole truth on the role of UTP members as campaign-

¹¹⁸ *Supra* pp. 237-47.

workers. MEA-GRD Director Gene Mammenga denied knowledge of MEA efforts to recruit the organization's members for campaigns:

Q. [by Dr. Vieira, for plaintiffs] * * * [quoting from Mammenga Deposition Exhibit No. 64] "Candidates receiving IMPACE contributions will receive written or direct notification of the contribution, and written rationale is available for use by GR chairpersons in organizing teachers to work for candidates receiving IMPACE contributions. * * *"

In your experience have GR chairpersons helped to organize teachers to work for candidates who receive IMPACE funding?

A. [Mr. Mammenga] * * * I have no knowledge of a systematic effort on the part of my department to tell GRC chairpersons this is what you should do, now you should go and work for so and so. We have not done that. [281]

Other deponents, however, refuted Mammenga's claim.

MEA-GRC Chairman J. M. Sokup, for example, testified that Mammenga was a key figure in the MEA contact-network through which MEA members were recruited for campaign-work:

Q. [by Dr. Vieira, for plaintiffs] Was it your understanding of the attitude of people connected with MEA-GRC and the Governmental Relations Department * * * that MEA was in a position to supply candidates with campaign workers?

A. [Mr. Sokup] The word "supply" I think is an inappropriate one. It implies an act to deliver bodies at a given notice. Our role was to encourage political participation and provide a network by which those who were interested could find others who were politi-

cally interested and give them an avenue of contact with the candidates.

. . . .

There were ways in which specific races would come to the attention of the department. For instance the director of the Governmental Relations Department, and as such would then—that would be made known to me and through me to teachers who lived in the district, in that particular legislative district.

Q. What were the ways in which particular candidates' campaign needs were made known to the Governmental Relations Department?

A. As a lobbyist obviously the director of the department would have contact with those who were incumbents and that incumbent might make that information known or did make that information known. In some cases the political parties made that information known.

Q. In some cases would candidates who were not incumbents . . . contact the MEA Governmental Relations office and inform people that they needed campaign help of some kind?

A. I cannot remember any specific cases but I'm sure that that did happen.

Q. All right then. You say someone in the Governmental Relations Department would have a discussion with you. . . .

. . . .

Q. . . . after Mr. Erskine left would that someone have been Mr. Mammenga?

A. Yes.

. . . .

Q. And after you had had discussion with . . . Mr. Mammenga with respect to the needs of candidate action you would then contact through the contact net-

work * * * someone in the legislative district? Who would that be? * * *

A. The usual procedure was for me to direct—that's not the appropriate term. To ask the—either the director or the secretary to pull out whatever names we would have of people from the legislative district and contact would be made there. * * *

Q. And what would you tell this contact person, in general terms?

A. Basically that such a candidate expressed an interest in having teachers work in his or her campaign.

Q. Then it was your understanding or hope that what would happen at the lower levels?

A. That the contact person would either personally or take it upon himself or herself to find persons who were willing to work in that campaign.

* * *

Q. Are you aware of a general NEA or MEA policy to aid favorable candidates with campaign workers whenever it's possible to do so?

* * *

A. I'm not aware of a policy. It was a goal and as such something that we tried to accomplish through the Governmental Relations Council.

Q. Did you understand this was a goal as well at the NEA level? I mean it was a general organizational goal of * * * the United Teaching Profession?

A. Yes. [358]

UniServ Director Sue Zagrabelny's testimony supports that of Sokup, and discredits Mammenga's:

A. [Ms. Zagrabelny] * * * in a legislative race, * * * we had pretty close tabs on legislators in the area.

We knew somebody that was involved in somebody's campaign . . .

Q. [by Dr. Vieira, for plaintiffs] You didn't need Mammenga to tell you that?

A. No.

Q. Now with respect to congressional campaigns, though, can you recall an instance in which you received . . . Contact information from GRC or from the Governmental Relations Department with respect to campaign volunteers?

A. That kind of information was usually made at GR Executive Committee meetings or council meetings . . . Someone working on that campaign would say, we are attempting to do this and we need help. If there are interested teachers—we would like you to get teachers that live in that congressional district. . . .

Q. Were you aware of instances of Governmental Relations Council meetings or Executive Council meetings . . . at which someone in attendance said something to the effect that candidate X needs or would like help from teacher volunteers. Will you people here help me to pass the word to recruit volunteers in the appropriate congressional district.

A. That was probably said at one time or another.

Q. And was it also the case at those instances that the person making this request would supply whatever information was necessary in terms of whom the teacher volunteers should contact. That is, call up Joe Jones at such and such campaign headquarters, or here's how you can volunteer. Here's where you should make your name known?

A. Yes.

Q. And were you aware that other members of the State GR Council were then taking this information

and in fact passing it along so as to encourage and inform teachers about campaigns of particular congressional candidates?

A. Yes.

Q. And in fact that was the purpose, was it not, of promulgating this information at the GRC meetings? Or at least the hope? Hope and purpose and intention, that other people would take this information and use it to encourage teachers to become campaign volunteers?

A. Yes. [359]

Thus, the testimony of both Sokup and Zagrabelny demonstrates that Mammenga's denial of knowledge of "a systematic effort on the part of [the MEA-GRD] to tell GRC chairpersons this is what you should do, now you should go and work for so and so" is unbelievable.

In sum, with respect to the extent of involvement by UTP members in candidates' campaigns, and to attempts by the UTP to promote this involvement and evaluate it, Harman and Mammenga did not tell the whole truth.

D. CERTAIN OF DEFENDANT'S STAFF-PERSONNEL HAVE NOT TOLD THE WHOLE TRUTH ABOUT THE MINNESOTA EDUCATION ASSOCIATION'S 1340 CLUB/COMMITTEE, OR ABOUT THE ROLE OF UNISERV DIRECTORS IN ACTIVITIES OF THE INDEPENDENT MINNESOTA POLITICAL ACTION COMMITTEE FOR EDUCATION.

From Parts IV.A. through IV.C., the impression might arise that defendants' campaign of false and incomplete testimony involves only NEA and MEA staff-personnel: namely, Baker, Bresin, Harman, Letorney, Lowell, Mammenga, McFarland, and Vander Woude. However, defendants' scheme did not leave out witnesses connected with the MCCFA and IMPACE: specifically, former MCCFA

Legislative Committee Chairman Neil Sands, MCCFA Executive Director and UniServ staff-man Ralph Chesebrough, and IMPACE Chairman Roger Johnson.

Both Sands and Johnson testified that, by 1978, the MEA-GRC's 1340 Club/Committee was no longer operative. Indeed, Sands claimed that "1340" had never had any significant existence at all:

Q. [by Dr. Vieira, for plaintiffs] * * * What is the 1340 Club?

A. [Mr. Sands] Well, I'm not sure it was ever formally structured into anything.

* * *

A. * * * As I say, I don't think the concept ever got off the ground and was formalized. I am not sure it exists now in any sort of structured way. * * *

* * * the structure was never completed sufficiently to become a reliable vehicle in a useful way.

Q. So you are not aware that at the present time that 1340 type organization exists within the MEA?

A. If it does, I'm not hearing about it. * * *

* * *

A. I'm not aware if the 1340 exists. [360]

Johnson also testified that the "1340" was "defunct":

Q. [by Mr. Logie, for plaintiffs] Are you a member of the 1340 Club?

A. [Mr. Johnson] I don't know. I don't know. I don't know if my name appears on a list * * *.

* * *

Q. Have you taken any steps to put your name on such a list?

A. Yes. Back in the early days of the formation of the 1340 Club we tried to get it going. I attempted to encourage educators in various Community Colleges around the State to get involved * * *.

Q. Who's the head of the 1340?

A. As far as I know it's defunct or on somebody's back burner somewhere. Now I haven't heard from it. I don't know if it died, if it's ongoing. I don't know who's in charge.

Again:

Q. Is Mr. Bradbury also involved in whatever remains of the 1340 Club?

MR. SELZER [counsel for defendants]: I object to the question as assuming that something remains to the 1340 Club, and I'm not sure what sort of evidence is on the record concerning that. You may answer to the extent that you can.

A. * * * I indicated * * * that I haven't heard anything from the 1340 Club. I used the word "defunct" to describe it. There doesn't seem to be any action going on associated with an attempt to organize it, reorganize it or keep it going. If such action is ongoing, I'm unaware of it. * * * [361]

The testimony of both Sands and Johnson is disingenuous, to say the least. Sands, for example, was "not sure [the 1340 Club] was ever formally structured", or that "the concept ever got off the ground and was formalized". Yet, in the Fall of 1975, Sands solicited MCCFA members for the group. [362] So did Johnson. [362] But his involvement with "1340" went farther than mere solicitation: In 1975, Johnson was a member of the so-called "1340 Club Task Force", selected because he was the MEA-GRC representative from the MCCFA. [363]

The claim by both Sands and Johnson that "1340" no longer exists, or is "defunct", is fantastic. UniServ Director Sue Zagrabelny, a key figure in the organization of "1340", emphasized that it and the MEA-GRC were and are, in effect, the same entity:

A. [Ms. Zagrabelny] * * * we are getting the 1340 effort confused with what the Governmental Relations Council is, and as far as I'm concerned we were never able to separate the two * * *. [364]

And even while Sands and Johnson were testifying as to the "defunct" status of "1340",¹¹⁶ the group was engaged in activities to implement its political goals:

A. [Ms. Zagrabelny] This [i.e., Zagrabelny Deposition Exhibit No. 18] a May 6th, 1977 memo to MEA-GRC Committee Members and Councillors * * *.

Q. [by Dr. Vieira, for plaintiffs] And the subject of this thing is—

A. Discussion of 1977-78 1340 Committee Goals.

Q. * * * were you aware that the goals listed here were in fact the goals of the 1340 Committee projected, at least, for the 1977-78 year?

A. Yes.

Q. Subsequent to May 6, 1977, have you become aware that these goals, or that activities have been undertaken in an attempt to implement these various goals in Deposition Exhibit 18?

A. Yes.

* * *

Q. Now * * * Deposition Exhibit 19 * * * talks about certain tasks that were identified for the first phase

¹¹⁶ Sands' deposition took place on 14 June 1978, Johnson's on 7-8 September 1978.

of '77-'78 1340 Committee Program, and it gives a tentative timeline running from September to . . . June and at the end of that timeline it says "End first phase."

Were there other plans for other phases of the 1340 Committee established?

A. Only in ideas of knowing what had to be done. . . . June is going to bring us through the convention phase of the political process, and starting in June there's going to be something else happen.

Q. Going from June to now [i.e., 17 November 1978], . . . what has happened in terms of 1340 Committee program activities?

A. . . . Well, from June, '78 through the summer was the whole candidate search and screening process, and that whole gamut of things. We just experienced an election and now we go into the session again.

. . . .

Q. So subsequent to these precinct caucuses and conventions the 1340 program involved candidate screening, the election of candidates to public office, and now is focusing on dealing with legislative matters that are being considered in the Minnesota Legislature?

A. That's correct. [365]

Zagrabelny described Sands as "a politically active person". [362] That such a person (as he testified) was "not hearing about" such "1340" political programs as precinct-caucus involvement, candidate search and screening, the election of candidates to public office, and lobbying is difficult to believe.

That IMPACE Chairman Johnson (as he testified) was "unaware" of "1340" is incredible. In 1977, for example,

the 1340 Committee and the IMPACE Campaign Committee cooperated in establishing simultaneous precinct-caucus and IMPACE training sessions for UTP members throughout Minnesota. The existence of these sessions was known, not only to the chairwomen of the committees, but also to all UniServ Directors, GRC Councillors, and certain top MEA officials, including MEA-GRD Director Gene Mammenga, who performs staff-services for the IMPACE under contract. [173] That all of these people knew of the role of "1340" in the regional training sessions, but Johnson did not, is absurd.¹¹⁷ In the Summer of 1978, again "1340" political activists organized and implemented the MEA-GRC's candidate-"screening" process. That process, of course, is designed to provide the IMPACE with data on the legislative and other positions of candidates for election to public office, on the basis of which the IMPACE decides whether or not to endorse or financially support particular candidates. [367] That IMPACE Chairman Johnson had no idea who supplied the IMPACE with "screening" information in 1978 is more than absurd—it reflects the hubris of defendants, and their apparent belief that their staff-personnel can lie as much, and as blatantly, as they want so long as plaintiffs have insufficient documentation to catch them in false testimony.¹¹⁸

¹¹⁷ Johnson served on the IMPACE Board of Directors from approximately 1971. He became IMPACE Chairman on 8 April 1978. [366] This long experience as an IMPACE leader indicates that he knows full well what the IMPACE does and how it cooperates with the MEA-GRC.

¹¹⁸ For instance, MEA-GRD Assistant Director Ken Bresin testified that his first connexion with "1340" came subsequent to November, 1977. [368] Yet, as a UniServ Director prior to that time, he must have had continual contact with the organization, particularly in the Fall of 1977, since UniServ Directors played a role in the "1340" precinct-training and -organizing activities.

MCCFA Executive Director and UniServ staff-man Ralph Chesebrough was no more candid in his testimony than were Sands and Johnson. Asked about his activities in connexion with and knowledge of the IMPACE, he claimed non-involvement and ignorance:

Q. [by Mr. Mullin, for plaintiffs] How does IMPACE get its money?

. . . .

A. [Mr. Chesebrough] In a solicitation campaign annually.

Q. Who conducts these solicitation campaigns?

A. IMPACE collectors or contact people.

. . . .

Q. Do you make recommendations for the contact people who will solicit the MCCFA members?

A. No, sir.

Q. How are those people selected?

A. I don't know the precise manner in which they are selected.

Q. Does GRC—

A. I don't get involved in that.

Q. Does GRC have anything to do with selecting the people?

A. I don't know.

Q. Does UniServ have anything to do with selecting the people other than the MCCFA organizations, so far as you know?

A. I don't know.

. . . .

Q. Well, is there someone who coordinates them, keeps track of them, makes sure that they do their

job and raise the specified amount of money?

A. Yes. That's handled through IMPACE.

. . . .

Q. Do you know whether that is one of his [i.e., Gene Mammenga's] duties?

A. No. I don't.

Q. Is there anyone else on the IMPACE staff whom you know does this?

A. I don't know. [369]

The record belies this testimony. First, UniServ Directors in general play a key role in the IMPACE's solicitation and collection of monies for partisan-political purposes. In 1973, for example, IMPACE Chairman Fulton Klinkerfues wrote that

[m]uch thanks and appreciation belongs to UniServ staff members for the efforts they made in promoting IMPACE within their UniServ Units. Our ability to reach and train local IMPACE chairmen was a crucial factor in the success of this year's drive. [370]

In another letter, he gave UniServ Directors

my congratulations and gratitude for the excellent job you did turning out teachers for the most recent political rally

IMPACE depends very heavily on the positive support and assistance of UniServ Directors all over the state of Minnesota. We appreciate all efforts that UniServ directors make to promote the cause of IMPACE [371]

Also in that year, Klinkerfues asked UniServ Directors to

[p]lease do whatever you can to get more local IMPACE drives under way in all locals under your supervision.

Should you need assistance * * * to conduct any more training sessions, do not hesitate to get in touch with us. * * * [372]

After the IMPACE fund-raising drive, he thanked

the UniServ staff for their very significant efforts on behalf of IMPACE. The greatest improvement in campaigning practices achieved this year was probably our ability to get to more of the individuals who actually went out and collected the money through local training sessions. * * * [T]raining the local collectors is one of the most crucial aspects of our campaign. * * * [373]

In 1974, at least, Chesebrough was one of the UniServ Directors involved in training IMPACE collectors "on approaches and problems of soliciting IMPACE contributions from members of the Community College Faculty". [374] The participation of UniServ Directors in IMPACE training and other activities did not end in 1973-1974, however. UniServ staff played an important role in the 1977-1978 IMPACE fund-raising drive. [173] Unless Chesebrough's position among UniServ Directors is unique, he, too, was active in IMPACE affairs.¹¹⁹

The record reveals that Chesebrough has been one cog in the mechanism through which IMPACE selects its collectors and collects political contributions. As IMPACE

¹¹⁹ Plaintiffs have requested, but have yet to receive, completed "List of IMPACE Local Chairpersons" forms for 1977-1978. [375] These forms contain the names of IMPACE collectors in each local unit of the MEA, and a signature-line for the UniServ Director. That Chesebrough has been active in identifying MEA political-action contact-people in the past, though, is well documented. [189, Erskine Memo]

Board member Roger Johnson wrote to the MCCFA Board of Directors:

The Chairman of IMPACE * * * assumes that I have already organized the M[C]CFA's IMPACE drive this year by appointing a contact chairman on each [community] college campus. One of the things I need from you is the name of your local contact man * * *. These names will be put on the mailing list so they will be plugged into the regular campaign operation. Please give the names to Ralph Chesebrough * * *. He will see that Klinkerfues receives the list.

I urge the [MCCFA] Delegate Assembly to set a clean-up date of May 31, 1972 to have all funds mailed in to Ralph Chesebrough. This should provide plenty of time for each local campus IMPACE contact chairman to see personally each faculty member. [376]

In the light of all the foregoing evidence, for Chesebrough to claim that he does not know "the precise manner in which [IMPACE collectors] are selected", whether Uni-Serv has anything to do with selecting them, or who coordinates and supervises them, is ridiculous.

In sum, deponents Rosalyn Baker, Kenneth Bresin, Ralph Chesebrough, Robert Harman, Roger Johnson, Joseph Letorney, Susan Lowell, Gene Mammenga, Stanley McFarland, Neil Sands, and R. Dick Vander Woude did not tell the whole truth about their and the UTP's involvement in political activism.¹²⁰ Instead, their testimony is a series of lies, half-truths, evasions, and equivocations that suggests a centrally directed concert of action aimed at

¹²⁰ By naming them in the text, plaintiffs do not concede that only these people have failed to testify properly. Considering the nature and scope of the cover-up defendants have staged throughout this case, plaintiffs cannot say to even a moral, let alone an evidential, certainty that the testimony of *any* of defendants' officials or staff-personnel is not tainted. Only full disclosure of relevant documents can determine that.

concealing from plaintiffs and this Court material evidence bearing on the UTP's support for candidates for public office.

V. Both Precedent and the Necessities of the Case Support the Relief That Plaintiffs Request in Their Motion.

The evidence sustaining plaintiffs' claim that defendants have approached discovery in this case in bad faith is massive. The question, then, is not "Should this Court enter sanctions against defendants?", but rather, "What sanctions are appropriate?" Both precedent and the practical necessities of the situation support the elements of relief set out in plaintiffs' Motion.

A. In *Seay*, MISCONDUCT SIMILAR TO SOME OF THAT IN WHICH DEFENDANTS HAVE ENGAGED HERE JUSTIFIED AN ORDER GRANTING THE AGGRIEVED PARTIES DIRECT ACCESS TO THE MALFACTORS' FILES.

In *Seay*,¹²¹ plaintiff nonunion employees challenged the purposes for which a defendant union used so-called "agency fees" paid by the employees pursuant to a collective-bargaining agreement. The employees requested production of the union's files, experienced substantial and repeated difficulty and delay, and gained access to only a small portion of the materials available. After further delay and the union's refusal to provide them with complete access, the employees obtained an Order from the District Court.

Pursuant to this Order, the union made available all its books and records (to the extent they existed) to the em-

¹²¹ *Seay v. McDonnell Douglas Corp.*, 417 F.2d 996 (9th Cir. 1970), *on remand*, 371 F. Supp. 754 (C.D. Cal. 1973), *rev'd*, 553 F.2d 1126 (9th Cir. 1976), *consent judgment on remand*, No. 67-1394-HP & 71-498-HP (C.D. Cal., 31 May 1977). Most of the description of the *Seay* litigation in this sub-Part is not reported; it appears, though, in an affidavit of one of plaintiffs' counsel here who was among counsel for the *Seay* plaintiffs. [A-15]

ployees for direct inspection without the intermediation of the union's personnel or counsel. As a result of this discovery, the employees prepared some 4,000 exhibits, totalling some 30,000 pages, to document the union's extensive political activities. (These exhibits, of course, represented only a small part of the documents the employees reviewed.)

Notwithstanding this discovery, the employees were unable to ascertain even approximately the true extent of the union's involvement in politics. And, in opposition to the union's motion for summary judgment, they argued that the union had made such a determination impossible by concealing relevant information on its political activities. The District Court, however, granted the union's motion for judgment.

On appeal, the Ninth Circuit reversed and remanded the case for trial, citing as one of the reasons the employees' contention that the union had concealed its political involvement. The parties then stipulated to a consent judgment.

The relief provided in *Seay*—that is, direct access to defendants' files, without the intermediation of their staff-personnel or counsel—is peculiarly apt here.¹²² As in *Seay*, defendants have failed to produce relevant documents that plaintiffs repeatedly requested, and have willfully concealed the existence or whereabouts of certain documents. Going beyond *Seay*, defendants in this case: (i) have refused in bad faith to admit or to stipulate to facts the record establishes beyond doubt; (ii) have destroyed, or

¹²² The relief granted in *Seay* is not unique to that case. *E.g.*, *Ranney-Brown Distributors, Inc. v. E. T. Barwick Industries, Inc.*, 75 F.R.D. 3, 7 (S.D. Ohio 1977) (offer of party to open files for inspection by other party); *United States v. Samson Management Corp.*, 64 F.R.D. 83, 85 (N.D. Ga. 1974) (discovery ordered where defendants did not make specific showing of burdensomeness).

are in the process of destroying, relevant documents that post-date the filing of plaintiffs' Complaint; (iii) through their staff-personnel called as deponents by plaintiffs, have confused and distorted the record with false or incomplete testimony; and (iv) generally have followed a policy of concealing their political activities, even while denying the existence or substantiality of those activities to plaintiffs and this Court. *Seay*, then, represents the very minimum of relief to which plaintiffs are entitled.¹²³

Moreover, the nature of the issues raised in this case, the likelihood of plaintiffs' success on the merits, the complexity of the UTP as an organization, and defendants' bad faith throughout the discovery-process all support a sweeping Order permitting inspection of the UTP's files *in toto*. Plaintiffs' requests are more modest, however. They seek access to those files only that are most immediately relevant to the involvement of the organization, its officials, staff-personnel, and members in the campaigns of candidates for public office: namely, the files of the governmental-relations, communications, and "field-services" departments of the NEA and MEA;¹²⁴ the files of the national- and state-level political-action committees; and the NEA Archives.¹²⁵ *Seay* and similar cases are more than

¹²³ *Seay* did not involve the type of willful cover-up plaintiffs' private investigators discovered, implicating the "NEA's attorneys" in a scheme to "stonewall" on discovery while simultaneously advising the UTP's "election pros" to continue their political activities in a surreptitious fashion. Part IV.B.2., *supra* pp. 259-97.

¹²⁴ The "field-services" departments (including UniServ) contain numerous so-called "organizational specialists" who, the record reveals, act as "election pros" in candidates' campaigns. Part IV.B.1., *supra* pp. 247-59.

¹²⁵ Plaintiffs' Motion para. D, pp. 28-29. Plaintiffs have also requested an Order that defendants provide a list of all documents that they have destroyed that relate to candidates' campaigns. *Id.* para. B, pp. 27-28. Without such an Order, defendants' past misconduct might yet prove successful.

adequate authority for this narrow request for direct access to defendants' files.

B. EACH OF THE ELEMENTS OF THE RELIEF THAT PLAINTIFFS REQUEST IN THEIR MOTION IS NECESSARY TO THE EXPEDITIOUS DEVELOPMENT OF A COMPLETE FACTUAL RECORD.

Practical considerations also support plaintiffs' Motion in all its particulars. Without a complete record of undisputed facts, this Court cannot properly decide the constitutional issues plaintiffs raise on motions for summary judgment. Rather, there must be a trial—and, with respect to some issues perhaps, a jury trial.¹²⁶ Furthermore, in light of defendants' campaign of "stonewalling", non-production, and untruthful testimony, a trial will be prolonged and complex—if it is to result in the detailed factual findings necessary for decision of constitutional questions, as it must to avoid an otherwise certain reversal and remand by the Supreme Court on appeal. The relief plaintiffs seek, however, can largely obviate such problems.

1. *Plaintiffs' unhindered access to certain complete files of the United Teaching Profession is necessary to inform future depositions and attempts to reach stipulations or compel admissions.*

Plaintiffs' access to the complete files of the several UTP departments they identify in their Motion will once-and-for-all put an end to the "I-need-to-see-the-document-to-tell-the-truth" ploy favored by defendants' staff-personnel whom plaintiffs have deposed.¹²⁷ Plaintiffs' possession of

¹²⁶ Plaintiffs' Amended Complaint requests a jury trial for all issues appropriately triable before a jury. What these issues are, is itself a difficult legal question, particularly where (as here) a three-judge Court is involved.

¹²⁷ *Supra* note 106 & text, p. 249; note 89, pp. 197-99.

all the relevant materials concerning UTP political activism will encourage witnesses to remember their roles, and the roles of other UTP officials, staff-personnel, and members, in the campaigns of candidates for public office. In addition, plaintiffs' possession of all the relevant materials concerning the UTP's electoral activities will encourage defendants and their counsel (i) to take a realistic view of the unlikelihood that denials and evasive answers will prevail at trial—and, on the basis of that view, (ii) to present plaintiffs with good-faith requests to stipulate to a set of undisputed facts that accurately describe what the UTP has been doing in the political arena since 1972.

These salutary ends are incapable of achievement absent an Order granting plaintiffs direct access to defendants' files. Plaintiffs have proven that they need a representative sample of actual, complete files, not simply piles of paper that defendants have carefully selected and expurgated. Moreover, for this Court to decide the significance, and therefore the discoverability, of each and every UTP document in the files plaintiffs identify in the Motion, is impossible. The only sensible recourse, then, is to afford plaintiffs the opportunity to inspect and analyze those documents for themselves.¹²⁸

2. *Judicially supervised depositions of certain of defendants' staff-personnel are necessary because of those persons' previous untruthful or incomplete testimony.*

Plaintiffs' access to the complete files of various UTP departments justifies re-deposition of those witnesses who

¹²⁸ *Socialist Workers Party v. Attorney General*, 458 F. Supp. 895, 904, 912 (S.D.N.Y. 1978). As to a workable mechanism for protecting defendants' interests with respect to any documents that may be irrelevant or privileged, see *United States v. American Telephone & Telegraph Co.*, No. 74-1698 (D.D.C., 11 Sept. 1978), Slip op. at 40-46. [377, pp. 40-46]

testified prior to plaintiffs' inspection of all the relevant documents in this case.¹²⁹ And with respect to the deponents plaintiffs identify in paragraph E. of their Motion, the record establishes the necessity for judicial supervision.

First, judicial supervision is necessary to impress upon these witnesses the gravity of the proceedings, and that the Court will not tolerate further untruthful and incomplete testimony. Second, judicial observation of their demeanor is necessary, particularly if issues of credibility should arise thereafter.¹³⁰ Third, judicial participation is necessary to prevent defendants' counsel from signaling and coaching the witnesses [378], or from distorting the record with gratuitous interjections and statements [379].

3. Depositions of other of defendants' staff-personnel are necessary to complete the record of political involvement on the part of the United Teaching Profession, its officials, staff-personnel, and members.

The individuals plaintiffs identify in paragraph F. of their Motion are uniquely knowledgeable concerning the political activities of the UTP. A. M. ("Barney") Palmer occupies a position at the MEA functionally similar to that of Gary Watts at the NEA level; he oversees UniServ and the MEA's "field-service" organizational specialists. Vaughn Baker is a political-education specialist in the NEA-GRD whom various deponents have repeatedly identified as the chief contact between the NEA and the Carter-Mondale campaign in 1976. Howard Carroll is a

¹²⁹ *E.g.*, *Bell v. Automobile Club of Michigan*, 25 F.R. Serv. 2d 798, 800-01 (E.D. Mich. 1978).

¹³⁰ A printed text cannot adequately describe how the behavior of some witnesses has revealed their lack of candor: *e.g.*, long and agitated hesitation before answering, rapid flushing of the face, or malicious smiling before responding "I don't know" or "I don't remember".

communications specialist assigned to the NEA-GRD, and frequently identified in deposition-testimony as a conduit of information between the NEA-GRD and Communications Department, particularly with regard to electoral matters. Kenneth Melley is Gary Watts' immediate subordinate in UniServ. And Leon Felix is an NEA Governmental Relations Consultant whose area of responsibility during the 1976 elections included the State of Minnesota.

The depositions of each of these individuals—encouraged by plaintiffs' access to the complete files of the various departments to which they are assigned—will add useful detail to the record, and serve as a check on the testimony of the other witnesses plaintiffs identify in paragraph E. of their Motion.

C. DEFENDANTS' MISCONDUCT ENTITLES PLAINTIFFS TO CERTAIN COSTS AND FEES THEY HAVE INCURRED OR WILL INCUR IN CONNEXION WITH PROSECUTING BOTH THIS MOTION AND PAST AND FUTURE DISCOVERY.

Because of defendants' misconduct throughout the course of discovery, plaintiffs are entitled to costs and fees as requested in their Motion.

First, since defendants' misconduct necessitated the Motion, defendants and their counsel, jointly and severally, should bear its cost.¹²¹

¹²¹ Bell, *supra* note 129, at 801; Marquis v. Chrysler Corp., 25 F.R. Serv. 2d 1314, 1315 (9th Cir. 1978). As Bell points out, that plaintiffs have received financial and other assistance from a legal-aid foundation throughout the course of this case is no reason not to tax costs and fees to defendants and their counsel:

The function of imposing sanctions is to assure both future compliance * * * and to punish past discovery failures, as well as to compensate a party for expenses incurred due to another party's failure to properly allow discovery. * * * [T]he method of financing of litigation is not relevant to a determination * * * of whether to impose monetary sanctions.

Second, defendants and their counsel should also assume the costs of plaintiffs' private investigators. After all, defendants' intransigent refusal to admit the nature and extent of their staff-personnel's involvement as "election pros" in candidates' campaigns necessitated the use of detectives. And the detectives established, not only that UTP "election pros" were participating in candidates' campaigns just as plaintiffs have maintained from the commencement of this lawsuit, but also that defendants, on the advice of the "NEA's attorneys", were engaged in systematic deception to conceal that crucial fact from plaintiffs and the Court. This is enough to tax costs and fees to the guilty parties.¹²²

Third, defendants and their counsel should assume the costs of the past and future depositions of the individuals plaintiffs name in paragraphs E. and F. of their Motion. The deponents identified in paragraph E. have testified untruthfully or incompletely in numerous instances; and for that reason their testimony has impeded the development of the record to which plaintiffs are entitled. The depositions of the individuals identified in paragraph F. are necessary because of this false and incomplete testimony, and because of other of defendants' improper activities designed to frustrate elucidation of the UTP's role in candidates' campaigns in the elections of 1972, 1974, 1976, and 1978. Again, this is enough to warrant taxing the costs and fees associated with these depositions to the mal-factors.¹²³

Therefore, * * * that in the instant suit many of the costs have been borne by [a non-party] has no relevance to * * * what * * * sanctions might properly be imposed against the defendants.

25 F.R. Serv. 2d at 800.

¹²² Bell, *supra* note 129, at 801.

¹²³ *Id.* at 801.

In sum, discovery is not a game of "hide and seek". The Federal Rules intend all parties to enter into it in a forthright effort to expedite litigation, so that there is no waste of time or needless expense of funds. This is particularly important in a case as complex as this. Defendants and their counsel having assumed an attitude and engaged in numerous activities inconsistent with the intention of the Rules, with this Court's Orders, and with plaintiffs' rights, justice and common sense require that they—and not plaintiffs—bear the full financial burden.¹³⁴

CONCLUSION

For these reasons, and on the basis of the facts plaintiffs set out in this Memorandum, this Court should sustain plaintiffs' Motion, and issue an Order granting the relief they request in paragraphs A. through G. thereof.

Respectfully submitted,

/s/ DR. EDWIN VIEIRA, JR.
Dr. Edwin Vieira, Jr.
12408 Greenhill Drive
Silver Spring, Maryland 20904
(301)-622-2804

/s/ JOHN J. FOGARTY
John J. Fogarty
8316 Arlington Boulevard
Fairfax, Virginia 22038
(703)-573-7010

Of Counsel:

Raymond J. LaJeunesse, Jr.
8316 Arlington Boulevard
Fairfax, Virginia 22038
(703)-573-7010

Done this 17th day of January, 1979

¹³⁴ *Id.* at 802.



APPENDIX E

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO REOPEN DISCOVERY •

(No date)

• *N.B.* All internal page-numbers and page-references in this document have been conformed to the pagination used in these Appendices.

ARTICLE I

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2.

SECTION 3. The Senate shall have the sole Power to try all Impeachments, when the President is tried, and when the Chief Justice is impeached, to sit with the Justices of the Supreme Court. And the Judgment shall not extend further than to removal from Office, and disqualification to hold any Office under the United States, but the Party convicted shall nevertheless be liable to Indictment, Suit, Prosecution and Judgment, according to Law.

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. No. 4-74-659

LEON W. KNIGHT, ET AL., *Plaintiffs,*

VS.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION,
et al., Defendants.

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION TO REOPEN DISCOVERY**

INTRODUCTION

On December 30, 1978, one day prior to the discovery deadline established by the Court at the October 13, 1978 pretrial hearing, plaintiffs served the present motion to reopen discovery. The motion comes 49 months after the institution of this lawsuit, and on the heels of massive discovery and assurances by plaintiffs at the October 13, 1978 pretrial hearing, that they had "just about [reached] the end of what [they] considered necessary to the presentation of the case . . ." October 13 Pretrial Transcript p. 4.

In spite of the tremendous scope of completed discovery and the October 13 representations to the Court, plaintiffs now seek to reopen all discovery for the articulated reason that defendants have somehow acted in bad faith throughout the two and one-half year course of discovery. The timing of the motion is supposedly supported by plaintiffs' desire to obtain a "complete dossier" of defendants conduct, which effort allegedly warrants their decision to postpone "any revelations to this Court" at the October 13, 1978 pretrial. Plaintiffs' Memorandum p. 82 (hereinafter called Pl. Mem).

On January 19, 1979, plaintiffs served their supporting Memorandum along with attached exhibits and affidavits. The eleven volumes of material plaintiffs have submitted to the Court consists of a 266 page brief, 9 volumes of exhibits, numbering 379, and one volume of affidavits, numbering 15. In spite of its length, the submitted material represents only a minute portion of the documents produced and the deposition transcript pages generated. The very length of this documentation belies the underpinnings of plaintiffs' motion.

As the remaining portion of this Memorandum will elaborate, defendants emphatically and categorically reject the insinuations and innuendoes contained throughout plaintiffs' 296 page Memorandum. The statements in the Memorandum are indicative of an incipient paranoia unfamiliar to defendants' counsel in its standard practice, (witness the suggestion that a "sprung staple" on a particular document somehow supports the supposition that defendants and defendants' counsel had been repeatedly engaged in inappropriate and even, as hinted in various portions of the brief, illegal activities). Pl. Mem. 175.

Defendants' Memorandum and the attached affidavit of Eric B. Miller will address the history of discovery in this case, the efforts of the counsel to reach an accommodation regarding particular discovery demands and the total inappropriateness of plaintiffs' request to reopen discovery.

I. In Spite of Plaintiffs Belated Protestations, They Admit They Have Been Afforded the Opportunity to Conduct, and Have Conducted, Complete and Thorough Discovery.

The history of discovery will be set forth in Section II below. However, it is informative to the issues at hand to review some of plaintiffs own admissions as to the discovery they have been afforded. The admissions come from the October 13, 1978 pretrial and their January 19 Memorandum and are repeated in *seriatim*.

1. "This [296 page] Memorandum [and 10 volumes of supporting material] also represents a substantial condensation and systemization of the factual material now available in the record . . ." Pl. Mem. 44.
2. "[P]laintiffs have amassed considerable evidence to support their allegations." Pl. Mem. 45.
3. "Since the fall of 1976, plaintiffs have amassed facts showing [what they intend to prove]" Pl. Mem. 80.
4. "[P]laintiffs have raised and documented the very-First-Amendment issue [which they assert is at the heart of their claim]" Pl. Mem. 76.
5. [After completion of the discovery set forth in pages 4 and 5 of the transcript of the October 13, 1978 pre-trial hearing,] we think we will have addressed all the evidence we believe is necessary to prove the contentions that we have made." October 13 Pretrial Transcript p. 6.
6. "[W]e ought to be able to [complete discovery], if we really push it, by early December-mid-December." October 13 Pretrial Transcript p. 10.

The above statements totally refute any after-the-fact representation that plaintiffs have not been afforded a full and complete opportunity to discover all relevant facts.

II. Defendants Have Complied in All Respects With Each and Every Discovery Request as Modified.

Reconstruction of the history of discovery in this case is time consuming, tedious and complicated. Nevertheless, the allegations set forth in Plaintiffs' Memorandum deserve more than cursory treatment if for no other reason than to reject the unsubstantiated assertions to the effect that plaintiffs' discovery has been anything less than they requested.

The present lawsuit was instituted on December 19, 1974. Following an initial stay of discovery because of the pendency of and subsequent rulings on certain motions, plaintiffs have engaged in what can only be described as painstakingly thorough discovery. Indeed, the thoroughness of the discovery is demonstrated by their instant papers before the Court.

Plaintiffs have served two sets of interrogatories on defendant unions which in all sub-parts total 371 questions. Plaintiffs have also served at least five sets of formal requests for production of documents. The documents produced in response to plaintiffs' demands number approximately 75,000 to 80,000 document pages. In addition, plaintiffs have taken the depositions of no fewer than 29 staff members of defendant unions and 8 persons who are not a party to this action, which depositions consumed somewhere in the nature of 55 days.

In an attempt to understand and fully comply with the lengthy sets of interrogatories and document demands and the 381 separate request for admissions, defendants met on numerous occasions with plaintiffs under the authority of Rule 5, Local Rules of Civil Procedure. As a consequence of those meetings and the understandings reached in those meetings, documents were produced along agreed upon guidelines as is set forth in more detail in the affidavit of Eric R. Miller. The depositions taken and categories of documents produced are as follows:

**DESCRIPTIVE SUMMARY OF DOCUMENTS
PRODUCED TO PLAINTIFFS BY
NEA, MEA, MCCFA, IMPACE**

NEA

Constitution and By-Laws

Budgets and Financial Statements

NEA Handbooks

Charts of Accounts

Policy Statements re: "Persons Paying Agency Shop Fees to NEA Affiliates" and "Political Activity Rebate Procedure"

"Speaking for Teachers" training materials

Board of Directors' Meeting Minutes

Executive Committee Meeting Minutes

Representative Assembly Proceeding Transcripts

Executive Office Central Correspondence files

Date Books of the President and Executive Director

Correspondence Files of the Goal Area Directors

—John Sullivan—Instruction and Professional Development

—John Cox—Teacher Rights

—Gary Watts—Affiliate Services

—Stanley McFarland—Governmental Relations

Correspondence files of administrative section directors

—Michael Dunn—Administrative Services

—Susan Lowell—Communications

Job descriptions

Business and Accounting documentation reflecting and supporting the NEA Program Budget

Guidelines for NEA-PAC

Government Relations—Monthly legislative reports

Evaluation of the UniServ program

Reports on Leadership Conferences for Education Association state presidents

Committee report re: dues increase

Report on the status of Strikes and injunctions

Documents re: endorsement of the Carter-Mondale candidacy

CAPE documents

Identification of legal case supported by NEA in Minnesota

Identification of cases in which NEA participated as amicus curiae

Correspondence files of Governmental Relations Staff

—Robert Harman—associate director

—Rosalyn Baker—liason to Federal agencies

—J. Latorney—Government Relations Consultant

—R. D. VanderWoude—Government Relations Consultant

NEA publications

—*Today's Education*

—*NEA Reporter*

—*NEA NOW*

—*NEA Advocate*

Press Releases

Communications and Public Relations Training Materials

Documents from the NEA Archives relating to "political activity"

MEA

Articles of Incorporation and By-Laws

Budgets and Financial Statements

Organizational Charts

Lists of Bookkeeping Accounts

Board of Directors' Meeting Minutes

Delegate Assembly Meeting Minutes

Resolutions re: Fair Share

Lobbyist Registration Forms and Disbursement Reports

Agreements between NEA, MEA and MCCFA

Publications: *MEA Advocate*, *Window on Legislation*, *VIP-Briefing Memo*, *Window on the Legislature*

"Political Action Workshop" materials

Expense Reports (of individuals noticed for deposition)

Job descriptions

Officers and Staff Manual

Negotiations Handbook

Correspondence files of MEA President

Correspondence files of MEA Executive Director

Rules, Regulations and guidelines for UniServ

Income and Expense Reports

UniServ staff training materials

Reports of meetings with legislators

Report of Future Directions Task Force

Precinct Caucus Training Materials

News columns of MEA President, Donald Hill

Correspondence files of MEA staff:

—K. Pratt—assistant director, communications

—K. Bresin—assistant director, governmental relations

Correspondence files of Governmental Relations Council Chairperson, M. Soku

Resource files of the *MEA Advocate*

Press Releases

MCCFA

Constitution and By-Laws

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Professional Staff Contracts

Board of Directors' Meeting Minutes

Delegate Assembly Meeting Minutes

Resolutions re: Fair Share

Lobbyist Registration Forms and Disbursement Reports

Tri-party Agreement between NEA, MEA and MCCFA

Publications: *Green Sheets* and *News Flashes*

Workshop materials

Legislative Reports of the Executive Director

Community College Contract Ratification Procedure

Certification of MCCFA as Exclusive Representative

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(6) Fulton B. Klinkerfues, March 15, 1977 (1) [Chairperson, IMPACE]	176
(7) John Schutt, March 18, 1977 (1) [Treasurer, IMPACE]	51
(8) Alfred Provo, March 31, 1977 (1) [Treasurer, MEA]	92
(9) Herbert Brunell, April 19, 1978 (1) [Controller, MEA]	53
(10) Gene Mammenga, June 12-13, 1978 (2) [Director of Governmental Relations, MEA]	292
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As the above list demonstrates, discovery has been exhaustive and complete. The assertions in plaintiffs' brief that defendants have somehow unilaterally restricted the scope of discovery are absolutely unfounded. Any restriction of discovery has come only with the consent of plaintiffs' counsel following Rule 5 meetings. This is amply demonstrated by the fact that during the entire period of active discovery spanning approximately two and one-half years, plaintiffs have never served upon this Court or raised to the Court's attention any refusal by defendants to answer any particular interrogatory or document demand to their complete satisfaction, save the instant motion.

Plaintiffs' suggestion that they were saving up their "complaints" until the day before the discovery deadline is a convenient reconstruction of history. In fact, even when presented with the opportunity at a late stage of discovery, plaintiffs' counsel did not relate to the Court any concerns regarding the inadequacy of plaintiffs' responses. See October 13, 1978 Pretrial Transcript. In addition, on December 20, 1978, after the completion of all discovery, save the depositions of Alice Morton and Matthew Reese,

plaintiffs failed to relate any discovery problems to Magistrate Renner even though discovery matters were argued before him that day.

III. Plaintiffs' Request to Reopen Discovery Must Be Denied as the Allegations of Discovery Irregularities Are an Absolute Falsehood or Pure Argument Not Related to the Discovery of Facts.

At the October 13, 1978 pretrial, the major question before the Court was the completion of discovery and the methods by which the Court might address the factual issues which will be presented by the parties. During the pretrial the following colloquys occurred:

1. Following the Court's inquiry as to what remained to be discovered, Mr. Vieira responded:

"Now as this summary prepared by Mr. Miller recounts, we have been, since early in 1977, conducting depositions of various individuals who fulfilled leadership roles in the NEA, MEA and MCCFA: their political action committees and so on. We have conducted 17 depositions, we have two that are scheduled for next week.

"The defendants have also produced, as this document recounts, quite a bit of materials that we are now analyzing and putting into form. We think we are getting just about to the end of what we consider is necessary to the presentation of the case . . .

. . .

"Our plan is a very simple one, it is a straight-forward one, as soon as we have finished with Baker and McFarland next week we have at present a list of four or six people, at most six, that we would want to call to finish up the depositions.

"As Mr. Miller has suggested here in this summary, there are some documents, six requests for the produc-

tion of documents that the NEA and MEA have yet to produce. We think we will have another couple of pages of document requests, especially after we have heard from McFarland and Baker.

"After that, as far as we are concerned, we think we will have adduced all the evidence that we believe is necessary to prove the contentions that we have made." October 13 Pretrial Transcript pp. 4-6.

2. In response to the Court's request regarding the amount of time necessary to complete the remaining discovery, Mr. Vieira stated:

"... we ought to be able to get it done, if we really push it, by early December-mid-December. After that it is a matter of preparing a record and drawing up a motion. We have been doing that as we have been going along.

THE COURT: From your standpoint we will complete all discovery by the 31st of December?

MR. VIEIRA: I think we can do that." October 13 Pretrial Transcript p. 10.

Subsequent to the pretrial conference, defendants cooperated in additional discovery far in excess of that outlined by plaintiffs' counsel at the pretrial. In all, fifteen depositions have been taken subsequent to October 13, ten of which were of employees or officers of the defendants. Moreover, a great volume of documents was produced during this period in an attempt to assist plaintiffs in completing discovery. In spite of this effort and repeated assurances made during the October 13, 1978 pretrial hearing, Mr. Vieira now glibly asserts that plaintiffs chose to "postpone any revelations to the Court, in the hope that defendants might at last cooperate in the development of the record of this case." Pl. Mem. 82.

Plaintiffs' admissions that they have "amassed" facts and "documented" their claims. (see, Pl. Mem. 45, 76 and 80), is basis, in and of itself, for dismissing their motion. However, not to go unrecognized is their obvious determination to ignore the Rule 37 procedure by which alleged failures to respond can be brought to the attention of the parties and the Court. Other courts, without respect to the merits of the motions to compel, have held that postponing "relevations" is totally inappropriate under the Federal Rules of Civil Procedure.

In *Zurzola v. General Motors Corp.*, 22 FRServ. 2d 1029 (E.D. Pa. 1975) the court noted that counsel for plaintiff failed to mention the discovery problems at pretrial conferences before the Court and hearings before the Magistrate:

"The record reveals that on September 13, 1973, counsel for plaintiff attended a pretrial conference before the Honorable Thomas A. Masterson, then of this court, and did not mention the unanswered interrogatories. Judge Masterson's subsequent pretrial order indicated that discovery was completed. On September 19, 1974, plaintiff's counsel appeared at a status call of this court, but did not refer to the unanswered interrogatories. Neither did plaintiff's proposed final pretrial order, filed on October 3, 1974. On January 29, 1975, United States Magistrate Richard A. Powers, III, conducted a pretrial conference in this action and his subsequent pretrial report, like Judge Masterson's, stated that discovery was complete.

. . .

"This record shows plainly that for a period of more than 18 months, in numerous appearances and pleadings before this court, plaintiff never once raised the issue of the unanswered interrogatories and never once suggested that discovery was not complete."

In *Price v. Maryland Casualty Co.*, 561 F.2d 609, 611 (5th Cir. 1977) the appeals court affirmed the trial court's ruling denying plaintiff's motion to compel discovery stating:

"At no time before the expiration of discovery did Price's counsel move . . . to compel responsive answers from any deponent who had refused to answer any questions. . . . Noting that plaintiff had been inexcusably dilatory in pursuing discovery . . . the district court denied plaintiff's motion. . . . While Fed. R. Civ. P. 37(a) does not specify a time limit in which procedures to compel discovery must be undertaken, courts interpreting that Rule have recognized that unreasonable delay can result in a waiver of a party's right to avail himself of the rule."

See also, *Butkowski v. General Motors Corp.*, 497 F.2d 1158 (2nd Cir. 1974).

While defendants' opposition to the motion to reopen discovery is based primarily on the fact that plaintiffs have secured all discovery requested and that additional discovery is totally unnecessary, the failure to request any court assistance in a timely fashion is further reason to deny their motion.

A. PLAINTIFFS' ALLEGATION THAT DEFENDANTS HAVE FAILED TO PROPERLY RESPOND TO THEIR REQUESTS FOR ADMISSION IS UNMERITORIOUS.

As the affidavit of Eric R. Miller sets forth, counsel for both parties met in lengthy sessions regarding the requests for admission and the methods by which specific requests could be modified to comport with the facts. As a result of these sessions, defendants either admitted, qualified or denied, each of the 381 requests. The responses were served on March 31, 1978. Plaintiffs did nothing with respect to the claimed inadequacy of those responses until nine months

later on the eve of the discovery deadline.¹ In fact, the responses were discussed at the October 13, 1978 pretrial wherein Mr. Vieira stated:

"We presented the defendants with 300 or so requests to admit certain facts and they admitted some and they denied others and we had conferences with them over the various types of language that we wanted or they wanted. Sometimes we compromised; sometimes they did; sometimes neither of us did." October 13 Pretrial Transcript p. 7.

Plaintiffs cannot now assert, after possessing the responses for nine months, that these responses somehow now support a massive reopening of discovery.

It would take days to explain the response to each of the 381 requests. Twenty-nine were admitted as written, 186 were partially admitted, 166 were denied. Responses to particular requests came after detailed review by clients and defendants' counsel, consisting of an analysis of (1) the terms as defined in the request, (2) the actual language

¹ In *Anco Engineering Co. v. Bud Radio, Inc.*, 8 FR Serv. 2d 37a.12, Case 1, the Court in a similar setting ruled:

"The defendant filed on October 8, 1962 a second set of interrogatories. These were answered by the plaintiff on November 16, 1962. On August 19, 1963, the defendant filed a motion to compel further answers to 17 of these interrogatories. . . .

"I am of the opinion that the orderly administration of justice requires that a motion such as this must be filed within a reasonable time. Here the defendant has filed its motion to compel further answers to interrogatories *nine months* after the interrogatories were answered by the plaintiff. The basis for the motion is that the answers are evasive and incomplete. This motion could have been filed promptly so as not to further delay the date when this case would be tried.

"Therefore, the motion will be denied on the basis that under the facts peculiar to this case it was not filed within a reasonable time." (Emphasis added).

of the request itself, and (3) a comparison of the language to the facts.

Initially, the scope of the definitions set forth in the requests posed an almost insurmountable hurdle. Two definitions are provided as examples:

"Lobby" or "lobbying" means any activity the purpose of which is to influence, *directly or indirectly*, the action of any government official, whether elected or appointed and includes any contact, direct or indirect, with any such official by any official staff person, member, or agent of NEA, MEA, MCCFA, NEA-PAC, IMPACE, or UniServ.

"NEA organization" means NEA, its local and state affiliates, NEA-PAC and all analogous political-action committees of local and state NEA affiliates, and UniServ—and specifically includes MCCFA, MEA, IMPACE, and Minnesota UniServ.

As far as could be determined under the definitions provided, lobbying included any indirect contact with any government official, elected or appointed. Under that definition, voting constitutes lobbying. The definition of "NEA organization" included literally hundreds of separate entities lumped together as if each were a mirror image of the other.

A sample of certain requests included within plaintiffs' brief demonstrates the obvious basis for the denials. For example, plaintiffs' complain about the refusal to admit a number of requests which incorporate Request No. 42 by reference. Request No. 42 includes a lead-in clause and five separate sub-parts, too lengthy to repeat here, which state in essence that it is a fact that teacher organizations must control the legislature, the executive branch, all administrative agents, and the courts in order to collectively bargain successfully, and are willing to utilize any and all

means at their disposal to attain that success. The request is simply untrue.

Another example is Request No. 41 which is reproduced here, with certain portions of the request underlined to highlight why it was denied.

"REQUEST No. 41. The *success* of the NEA organization's legislative program *requires* that the NEA and its state and local affiliates exert the *maximum possible political influence* over the legislative, executive, and judicial branches of the state and federal governments: namely, insofar as it is possible, *directly controlling the composition of State legislatures and Congress*, and the identity of state governors and the President of the United States, through intervention and participation in partisan-political campaigns of candidates for election to public office; and *indirectly controlling the composition of the state and federal courts* through the exercise of influence or control over executive appointments and legislative confirmations."

A number of other requests were denied because they incorporated sub-parts of either Request No. 42 or very similar Request No. 57. See, Request No. 46, Request No. 60, Request No. 61, Request No. 62 which are listed on pages 56, 58, 59 and 60 of Plaintiffs' Memorandum respectively.

A similar examination of each particular request and response could be made, however, we do not believe that effort is warranted, particularly in light of plaintiffs' admission that defendants' responses to the requests to admit are "typical of their attitude throughout this case: namely, admit the bare facts that something was done or said by UTP, but denies its obvious significance." Pl. Mem. 94.

Defendants do not intend to admit to plaintiffs' opening and closing arguments. Defendants have admitted the "bare facts".

B. PLAINTIFFS' ALLEGATION THAT DEFENDANTS HAVE NOT PRODUCED ALL DOCUMENTS AS REQUESTED IS TOTALLY UNSUBSTANTIATED.

Discovery requests relating to the specific correspondence files were uniformly limited, per Rule 5 meetings, to each person's specified correspondence files, provided the files were separately maintained. See affidavit of Eric R. Miller. This agreement was necessitated by the fact that certain deponents did not maintain separate correspondence files, but rather, filed all correspondence in the file to which the correspondence related. In order to fully and completely locate all such correspondence it would require the commitment of many person hours. It was agreed by plaintiffs' counsel that this effort was not necessary and that any correspondence requests would be limited to identifiable correspondence files segregated from other files.

The scope of the requested discovery and the resolution is readily understandable to any person who has practiced law. Some attorneys keep "day files" of all of their correspondence which are maintained separately. Such a day file is easily locatable and easily produced. However, in the absence of such a file, the production of all correspondence ever authored or received by an attorney would require the review of virtually hundreds of files. The same was true with respect to a number of deponents in this case. Such an effort was not required or expected by plaintiffs and all segregated correspondence files were produced per agreement. In addition, numerous individually requested documents and subject matter files from departments and individuals having a working relationship with deponents were produced and consisted of many documents authored or received by the deponent.

The plaintiffs also claim that the defendant deponents failed to participate in the identification of their correspondence files for purposes of production prior to their depositions. However, the transcript quotations cited by the

plaintiffs uniformly confirm that each deponent's secretary or administrative assistant worked with defendants' counsel in identifying and collecting the requested documents. Pl. Mem. 155, 157, 157-58 and 164. In the case of Rosalyn Baker, she was not asked if her secretary was involved and Alice Morton specifically directed defendants' counsel to the documents which were responsive to the plaintiffs' request. Pl. Mem. 161. It is typical in the real world for a secretary or administrative assistant to be more knowledgeable about the files and filing system and several of the deponents indicated this during their testimony.

Plaintiffs assert that only a portion of certain files have been produced and that the balance of these files were improperly withheld by defendants. The plaintiffs support this allegation by assuming how many drawers are in a file cabinet (Pl. Mem. 165), assuming that *all* of the documents contained in an *estimated* number of file drawers were responsive to the plaintiffs' request (Pl. Mem. 167, 168 and 169) when in fact the plaintiffs' requests were limited to the time frame of 1971 to the present and did not include all of the types of documents maintained by the deponents.

The plaintiffs also conveniently failed to disclose in conjunction with their allegations concerning the files of Ken Bresin (Pl. Mem. 166-67) the specific agreement arrived at in a Local Rule 5 meeting of counsel that since Mr. Bresin did not maintain a correspondence file there would be no documents produced prior to his deposition. (See, Affidavit of Eric R. Miller and Exhibit K attached thereto).

The plaintiffs allege that documents concerning Project 18 and the Youth Franchise Coalition were improperly withheld in conjunction with the deposition of Alice Morton. Pl. Mem. 186-87. However, a review of the exhibits to Plaintiffs' Memorandum (Exhibits No. 246 and 247) clearly indicates that these activities were solely in regard to gaining the right to vote for 18 year old citizens and, therefore,

were not relevant to the scope of the subpoena duces tecum which covered only documents concerning the political campaigns of candidates for public office. Pl. Mem. 149.

Finally, the plaintiffs apparently seriously rely on their observations that one file folder was "turned in the opposite direction from the other file folders" and that a document "was torn in the corner" to support the allegation that documents have been withheld. Pl. Mem. 174-75. Such observations serve only to reflect the delusions of the crusade in which plaintiffs' counsel participate.

It must again be stated that the vast majority of document production was accomplished prior to the October 13, 1978 pretrial conference and the plaintiffs in no manner indicated dissatisfaction to defendants' counsel or the Court. Plaintiffs again had the opportunity to express their concern in the hearing before Magistrate Renner on December 20, 1978, by which time all of the depositions and the related production of documents had been completed except for Alice Morton and Matthew Reese and yet the plaintiffs raised no objection.

C. PLAINTIFFS' AMBITIONS TO REDEPOSE CERTAIN WITNESSES, AND TO DEPOSE ADDITIONAL PERSONS ARE UNJUSTIFIED.²

² When faced with a similar argument in *United States v. DeVincentis*, 30 FRD 71 (E.D. Pa. 1962) the court stated:

"[1] Plaintiff . . . asks the Court to direct the witnesses named to answer specific questions, and, in addition, to answer general questions on depositions, they having previously appeared and been examined extensively on the issues involved in the case. Plaintiff has not shown us in his argument or brief any authority for the taking of general depositions under the provisions of Rule 37 . . .

• • •

"The issue as we see it is whether the defendant now, in the light of the former depositions, interrogatories and admissions, should be compelled to again produce the witnesses for either

The crux of plaintiffs' request to redepose a large number of witnesses rests upon their belief that they, rather than the Court, are entitled to rule on the credibility of a particular witness or the weight to be given to a witness' testimony. The short answer to plaintiffs' contention is obvious: plaintiffs may impeach any witness they desire from the wealth of material at their hand.

It is submitted, however, that plaintiffs' will not be as successful at impeachment as the length of their one hundred-plus page argument on this subject might (without reading) suggest. A cursory examination of its pages reveals numerous flaws in plaintiffs' analysis of the testimony. It is not appropriate or necessary to provide the Court with an item by item refutation of plaintiffs' argument. What follows is a summary, supported by selected examples from plaintiffs' brief, of the fundamental errors in plaintiffs' approach to the testimony taken in this case.

In the introductory portion of their brief, plaintiffs note that their theory in this case views the MEA, NEA, IMPACE, etc., as a single, "integrated" organization ("UTP"). A reading of the entire brief provides a greater understanding of plaintiffs' view of these organizations: defendants are a highly centralized, well-oiled machine relentlessly plotting the political destiny of the nation. Where a witness' testimony suggests a lesser degree of organizational efficiency or formality, plaintiffs charge the witness with lying. Where witnesses such as Messrs. Bresin and VanderWoude testify to their work in a political campaign, they are charged with telling the truth only because defendants "feared that plaintiffs knew something" (Pl. Mem. 266) or because a "last-minute arrival",

general depositions or compelling answers to specific questions. In our opinion, to direct them to do so would constitute harassment and an undue burden on the defendant without justification for the reasons above set forth."

(Pl. Mem. 235) allowed inadequate time for fabricating the complex web of lies imagined by plaintiffs. It is all part of "the conspiracy". Given plaintiffs' unyielding dedication to this perception of defendants, Mr. Vieira's comment during the McFarland deposition is appropriate: "We live in different worlds." (Pl. Mem. 199.)

As an example, plaintiffs dwell on the existence or non-existence of "evaluations of the involvement of UTP members in the Carter-Mondale campaign." Pl. Mem. 237-42. The testimony of Harman, McFarland, Lowell, Weissman and VanderWoude is consistent with the fact of some informal discussion, from time to time, concerning the status of this activity. Plaintiffs' perception of defendants, however, prevents their acceptance of anything short of a formalized, chain-of-command reporting procedure. A similar fallacy exists in plaintiffs' discussion of post-election "reports". Pl. Mem. 242-46. Because witnesses do not testify to such a system, plaintiffs charge them with lying.

Plaintiffs' perceptions of defendant organizations extend to the abilities attributed to staff personnel: persons deposed are imagined to have computer-like recall of broad sets of facts. Mr. McFarland must be lying because he cannot remember a two-year old telex. Pl. Mem. 198-99. Mr. Harris must be lying because he cannot recall a four-year old document. And counsel for plaintiffs seem more concerned with "establishing" the "fact" of the lie than obtaining substantive information, because he refuses to show Harris a document which might refresh his memory:

"MR. GOODWIN: If you want to show us the NEA document—

MR. VIEIRA: No. You are not going to see this document. This is going into the Court along with a number of others. We won't bother to show you everything we have. We will let you sink deeper and deeper into the quicksand.

MR. GOODWIN: So I understand—You are reading from a document and asking questions about the document to the witness. Is that correct?

MR. VIEIRA: No. It is not correct. I don't intend to answer any more questions." Pl. Mem. 198.

Further, plaintiffs suppose staff personnel to recall with special detail matters believed to be relevant to plaintiffs' case. Mr. McFarland must be lying because he has no detailed recollection of an alleged "program" of UniServ campaign participation "which should have impressed almost anyone who learned of it". Pl. Mem. 236. Matters viewed as "impressive" to those dedicated to plaintiffs' cause, of course, are not universally so perceived.

Plaintiffs' use of language is pervaded by their ideological position (as is evidenced in their Rule 36 requests). In addition, while plaintiffs are unwilling to forgive any imprecision in wording used by defendants (it is all part of "the conspiracy"), they purport to demonstrate contradictions through changing the meaning of terms. For example, plaintiffs make much of Mr. Mammenga's statement that he was not a "volunteer" of any particular candidate campaign. Pl. Mem. 219-22. Plaintiffs fail to note that earlier in that deposition, plaintiffs' counsel defined the "volunteer" as being one of two things: a political organizer "who would come in and help me set up a campaign," or a person who "would do the nuts and bolts duties in terms of sitting at the telephone banks". Mammenga Depo. p. 220-221. Understood in this fashion (and without arguing the fact of this explanation), Mammenga's testimony is not inconsistent with subsequent statements cited by plaintiffs indicating that Mammenga may have had some contact with the Carter-Mondale campaign. Moreover, in attempting to establish the attempted "conspiracy", plaintiffs went so far as to depose members of

the White House staff. Despite extensive questioning these officials knew nothing of any participation by Mr. Mam-menga in the campaign.

Similarly, plaintiffs frequently purport to "impeach" a witness by quoting a statement dealing with a different subject. For example, Ms. Lowell's lack of recollection concerning solicitation of campaign workers by staff is "contradicted" by her later statement concerning actual campaigning by teachers, which is supposedly "inconsistent" with Mr. Harman's lack of recollection that certain types of staff were "loaned" to Carter-Mondale campaign. Pl. Mem. 225-27.

Such is the substance of plaintiffs' supposed conspiracy. However, one is inclined not to doubt plaintiffs' sincerity. Plaintiffs' response to the "conspiracy" has been a counterattack wherein a small army of private investigators was sent to Minnesota to surreptitiously observe and question personnel connected with defendants. The ethical propriety of this activity is addressed in a separate motion. Plaintiffs rely on reports received from these investigators to suggest further lying. Pl. Mem. 259-97. Assuming arguing the truth of Investigator Saunders' reports, the significance of any inaccuracies in Messrs. Bresin's and VanderWoude's testimony are less than startling. How many evenings were Bresin and VanderWoude at the Fraser phone bank—two or three? Did VanderWoude look up names in a telephone directory on the evenings in question or didn't he? Is Bresin's failure to work on an official basis for Fraser explained by an MEA policy or by advice from NEA attorneys? It is difficult to see how the alternatives presented by this last question are inconsistent, let alone proof of some "conspiracy". In all cases, any inconsistency is trivial and in the final analysis is for the Court to weigh.

Plaintiffs have enjoyed massive discovery in this case. Depositions have included numerous people within the de-

fendant organizations. In addition plaintiffs have deposed individuals outside the organization—including members of the White House staff. Plaintiffs have the tools to impeach testimony they believe to be untrue to the extent those tools exist and the testimony is impeachable.

It is clear that plaintiffs don't like much of what they hear. Additional depositions and redepositions must not be ordered, however, simply because discovery has not established defendant organizations as the type of entity which plaintiffs believe them to be.

CONCLUSION

It is obvious from reading Plaintiffs' Memorandum that the ideological viewpoint of plaintiffs has prevented their objectively considering the scope of discovery. A cursory reading of the 296 page Memorandum, if not the length of it alone, demonstrates the extensive lengths to which the plaintiffs will proceed in attempting to prosecute their case. While defendants do not begrudge them the opportunity to present their viewpoints to the Court and to adequately discover all facts which relate to those viewpoints, the discovery produced comprehensively responds to all requests they have made.³

Defendants respectfully request the Court to refuse to modify its October Order terminating discovery as of December 31, 1978. Plaintiffs have had complete and thorough discovery. Not once throughout the course of discovery, save the filing of this motion, have plaintiffs come to the Court complaining of unfair restrictions on discovery by defendants. Further, during the October 13, 1978 pretrial,

³ If anyone has legitimate grounds for complaint concerning discovery, it is defendants. Despite the modest nature of defendants' discovery attempts, plaintiffs have failed to respond to defendants' outstanding interrogatories.

defendants' counsel represented to the Court that it would complete discovery by mid-December, 1978, and that the December 31, 1978 discovery deadline was totally compatible with their needs. No basis exists to reopen discovery along the lines suggested by plaintiffs particularly where,* as here, plaintiffs have consciously chosen not to bring their "relevations" to the attention of the parties or the Court in a timely fashion.

OPPENHEIMER, WOLFF, FOSTER, SHEPARD
AND DONNELLY

By /s/ ERIC R. MILLER
ERIC R. MILLER
KEITH E. GOODWIN
DONALD W. SELZER, JR.
1700 First National Bank Building
St. Paul, Minnesota 55101

* The *Seay v. McDonnell Douglas Corp.* cases cited on pp. 323-25 of Plaintiffs' Memorandum as authority supporting their motion to reopen discovery do not even address discovery issues. The unpublished *Seay* opinion attached to plaintiffs' affidavit A-15 only requires production of documents which were produced long ago in this case.

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. No. 4-74-659

LEON W. KNIGHT, *et al.*, *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION,
et al., *Defendants.*

STATE OF MINNESOTA,
COUNTY OF RAMSEY, ss.

AFFIDAVIT OF ERIC R. MILLER

ERIC R. MILLER, being first duly sworn, states and alleges as follows:

1. He has been one of the defendant employee organizations' attorneys of record since the initiation of this litigation.

2. He did personally review all of the Interrogatories and Requests for Production of Documents when served by the plaintiffs on the defendants.

3. He participated in all of the meetings conducted under Rule 5 of the Local Rules of Practice for the United States District Court for the District of Minnesota in regard to the plaintiffs' Interrogatories and Requests for Production of Documents.

4. At least one Local Rule 5 meeting was conducted in regard to each set of plaintiffs' Interrogatories and each of plaintiffs' Requests for Production of Documents and that many of these meetings were one full working day in length.

5. During the Local Rule 5 meetings defendants' counsel explained on many occasions the difficulties they had with the plaintiffs' discovery requests in light of their broad scope, uncertain language and the size and complexity of the defendant employee organizations, particularly the National Education Association.

6. Plaintiffs' counsel frequently indicated agreement to narrowing the scope of their Requests for Documents or eliminating certain portions of the requests entirely during the Local Rule 5 meetings.

7. Substantial correspondence was generated by counsel for plaintiffs and defendants describing the agreements reached in the Local Rule 5 meetings concerning the documents to be produced by the defendants in response to the plaintiffs' Interrogatories and Requests for Documents. A small sample of this correspondence is attached hereto as Exhibits A through L.

8. Defendants' counsel, on several occasions, explained to plaintiffs' counsel that many of the defendants' officers and employees did not retain in their own files many of the documents they prepared or received but rather the documents were provided to another persons for their files or filed in a departmental file. Plaintiffs' counsel specifically expressed understanding and agreement that the defendants would be unable to identify and collect every document authored or received by certain officers and employees of the defendants over the more than 7 year time period covered by the litigation.

9. Specifically in regard to the files of certain officers and employees of defendants who were to be deposed by the plaintiffs it was understood and agreed to by plaintiffs' counsel that the defendants would not be responsible for identifying and collecting every document authored or received by each deponent but rather produce only the correspondence specifically filed or designated as correspondence. This understanding is exemplified by the letter of

William Mullin dated November 7, 1978, and attached as Exhibit K.

10. In addition to the correspondence files of each deponent numerous individually identified documents and subject matter files from related departments were produced which contained extensive documentation prepared or received by the respective deponent.

11. It is believed that virtually every individual paragraph of every request for the production of documents served by the plaintiffs was reviewed and resolved during the many Local Rule 5 meetings.

12. At no time during the Local Rule 5 meetings or subsequent to the actual production of the agreed upon documents did plaintiffs' counsel indicate objection to the agreements reached or the documents produced.

13. Upon receipt of the plaintiffs' requests for admission a series of extensive meetings between counsel for plaintiffs and defendants were conducted and consumed at least 7 full working days. (See report of counsel to the Court dated and attached as Exhibit M.) These meetings were conducted under the spirit of Local Rule 5.

14. The purpose of these meetings were to clarify the language, scope and intent of many of the requests for admission. Counsel for the parties each re-drafted many of the requests as a result of the meetings and these revisions were reviewed in additional subsequent meetings.

15. Plaintiffs' counsel ultimately decided to revert to the original requests for admission with few exceptions and the defendants provided responses to them.

/s/ ERIC R. MILLER
Eric R. Miller

Subscribed and sworn to before me this 26th day of
January, 1979.

/s/ MARIANN MACALUS
Marian Macalus

Notary Public—Minnesota, Ramsey County.

My Commission Expires July 30, 1985.

APPENDIX F

PLAINTIFFS' REPLY MEMORANDUM TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO REOPEN DISCOVERY •

Dated 2 February 1979

• *N.B.* All internal page-numbers and page-references in this document have been conformed to the pagination used in these Appendices.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-74 Civ. 659

LEON KNIGHT, *et al.*, *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION,
et al., *Defendants*.

**PLAINTIFFS' REPLY MEMORANDUM TO DEFENDANTS'
MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION
TO REOPEN DISCOVERY**

EDWIN VIEIRA, JR.
12408 Greenhill Drive
Silver Spring, Maryland 20904

JOHN J. FOGARTY
8316 Arlington Boulevard
Fairfax, Virginia 22038

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IN THE
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MINNESOTA CUMMUNITY COLLEGE FACULTY ASSOCIATION,
et al., *Defendants*.

INTRODUCTION

Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery provides further support, if any more were needed, for plaintiffs' Motion that this Court rescind its Order of 13 October 1978 and grant plaintiffs the other relief they request. Defendants' rhetorical style characteristically appears in their charge that plaintiffs' presentation to this Court is "indicative of an incipient paranoia unfamiliar to defendants' counsel in its standard practice".¹ "Paranoia", however, is "a mental disorder characterized by systematized delusions".² And a brief over 200 pages long, with nine volumes of exhibits and a volume of affidavits attached, is hardly the product of "delusions". Rather, it represents a painstaking point-by-point and word-by-word documentation of defendants' misconduct in discovery that defendants make no serious attempt to address, let alone refute. Nowhere in their Memorandum do defendants deal with these points plaintiffs raise, or analyze the documents or testimony plaintiffs

¹ Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 336.

² Webster's New Twentieth Century Dictionary of the English Language 1300 (unabrgd. 2d ed. 1971).

quote. They simply deny what they cannot answer. Bare denials, though, are not enough.

Typically, defendants' Memorandum is a web of misrepresentations of fact and law.³ And the little case-authority they cite in their defense is inapposite. All in all, defendants' Memorandum proceeds on the theory of confession and avoidance: They essentially admit that they have denied plaintiffs' Requests to Admit in bad faith, that they have withheld from production and destroyed relevant documents, and that certain of their staff-personnel have testified falsely or incompletely. But then they claim that, even so, plaintiffs are not entitled to relief because there has been "enough" discovery, and plaintiffs have brought their motion "too late". These claims are meritless; and, because they are, defendants' Memorandum merely reinforces—indeed, constitutes an admission of—what plaintiffs have already proven.

I. In Essence, Defendants' Memorandum in Opposition Amounts to an Admission of Their Misconduct in Discovery.

Plaintiffs have exhaustively documented their assertions that defendants have refused to answer Requests to Admit in good faith, have withheld and destroyed documents without notice or explanation, and (through certain of their staff-personnel) have testified falsely or incompletely. And, stripped of double-talk and misrepresentation, de-

³ For example, at one point defendants refer to "the depositions of 29 staff members of defendant unions and eight persons who are not a party to this action"—as if *all* of the "29 staff members" are parties hereto. Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 338. • • •

At another point, defendants' refer to deponent Matthew Reese as "Public Relations Consultant to NEA"—when in fact Reese is a consultant on *political* action, not public relations. Defendants' Memorandum 346. Contrast Reese Deposition at 4-10.

fendants' response to these charges is, in essence, an admission of their truthfulness.

REQUESTS TO ADMIT

Defendants first claim that their

[r]esponses to particular requests came after *detailed review by clients* and defendants' counsel, consisting of an analysis of (1) the terms as defined in the request, (2) the actual language of the request itself, and (3) *a comparison of the language to the facts.*⁴

Plaintiffs have never seen any "analysis of . . . the terms as defined in the request", or of "the actual language of the request itself"; and defendants present no such analysis, for any Request, to the Court. Moreover, if anyone has made "a comparison of the language [in a Request] to the facts", it is plaintiffs—who have demonstrated that the facts expose as groundless twenty-six of defendants' denials chosen as examples.⁵ In addition, the record belies defendants' claim of "detailed review by clients". Key figures such as McFarland, Watts, and Lowell were not at all or only peripherally involved in "review" of plaintiffs' Requests;⁶ and defendants have not identified to plaintiffs or this Court any other individuals who *did* consult with respect to the Requests.

"It would take days", say defendants, "to explain the response to each of the 381 requests."⁷ Revealingly, de-

⁴ Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 351-52 (emphasis supplied).

⁵ Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 89-135.

⁶ *Id.* at 85-86.

⁷ Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 351.

fendants do not attempt to explain their response to even one—other than by underlining certain words in Request No. 41, and suggesting that mere emphasis alone “highlight[s] why [the Request] was denied”. And even there, defendants make no attempt to refute plaintiffs’ showing that the testimony of NEA President John Ryor belies their denial.⁹

Defendants also disingenuously suggest that the definition of “lobbying” used in the Requests to Admit posed “an almost unsurmountable hurdle” because, “[u]nder that definition, voting constitutes lobbying”.⁹ Besides being ludicrous on its face, and a further example of defendants’ attempt to bog down every aspect of this case in a welter of semantics, trick-words, and secret definitions,¹⁰ this excuse flies in the face of statutes such as the federal regulation of lobbying act, which speaks of activities “[t]o influence, *directly or indirectly*, the passage or defeat of legislation”¹¹—and includes the very emphasized words that defendants claim require the conclusion that “voting constitutes lobbying”.

Defendants also misrepresent to this Court that plaintiffs have agreed that “[d]efendants have admitted the ‘bare facts’”.¹² What plaintiffs said, of course, was that defen-

⁹ Memorandum of Points and Authorities in Support of Plaintiffs’ Motion to Rescind the Court’s Order of 13 October 1978, at 98-100. *See also id.* at 95-98.

⁹ Defendants’ Memorandum in Opposition to Plaintiffs’ Motion to Reopen Discovery 352.

¹⁰ Memorandum of Points and Authorities in Support of Plaintiffs’ Motion to Rescind the Court’s Order of 13 October 1978, at note 56, pp. 89-90.

¹¹ 2 U.S.C. § 266(b) (1970) (emphasis supplied).

¹² Defendants’ Memorandum in Opposition to Plaintiffs’ Motion to Reopen Discovery 353.

dants "admit[ted] the bare fact that something was done or said by the UTP, *but den[ied] its obvious significance*".¹³ An excellent example of this is defendants' denial of the significance of the UTP's "legislative report cards".¹⁴ In short, defendants have admitted only such "bare facts" as they deigned to admit—not the facts the record documents, or the facts to an admission of which plaintiffs are entitled.

Defendants' Answers to plaintiffs' Requests to Admit "were not complete, explicit and responsive"; and defendants never explained why they could not respond in detail, or what efforts (if any) they expended to obtain the information necessary to answer in good faith.¹⁵ And they have provided no better answers or explanations to this Court.

PRODUCTION OF DOCUMENTS

Defendants attempt to mislead this Court with respect to their production of documents by providing what they call a "Descriptive Summary of Documents Produced to Plaintiffs—as if *all* the documents in the various categories contained in the "summary" had been made available to plaintiffs. They have not. Indeed, quite the opposite: Defendants have withheld *and destroyed* documents without notice and explanation, either before plaintiffs' pending Motion to Rescind the Court's Order of 13 October 1978 or after.¹⁶

¹³ Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 94 (emphasis supplied).

¹⁴ *Id.* at 107 & n.62.

¹⁵ *Milner v. National School of Health Technology*, 73 F.R.D. 628, 632 (E.D. Pa. 1977).

¹⁶ Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 143-90. Revealingly, defendants say *nothing* about the destruction of relevant documents that post-date the filing of plaintiffs' Complaint.

Defendants misrepresent that "the vast majority of document production was accomplished prior to the October 13, 1978 pretrial conference".¹⁷ The vast majority of *non*-production of documents of *which plaintiffs complain*, however, occurred simultaneously with or after the 13 October hearing—including the production of documents for McFarland, Rosalyn Baker, Harman, Bresin, Zagrabelny, Vander Woude, Pratt, Lowell, Harris, and Morton.¹⁸ That plaintiffs emphasize defendants' non-production of "correspondence-files" is because plaintiffs believe these files to be of singular materiality to this case, not because plaintiffs concede that defendants' production of other documents, either before or after 13 October 1978, has been sufficient under the Federal Rules of Civil Procedure.

Defendants correctly recite plaintiffs' fully documented charge that

deponents failed to participate in the identification of their correspondence files for purposes of production prior to their depositions.

But they then attempt to excuse this conduct by saying that each deponents' secretary or administrative assistant worked with defendants' counsel in identifying and collecting the requested documents.¹⁹

¹⁷ Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 356.

¹⁸ The only "correspondence-files" to which plaintiffs refer that were not produced after 13 October are those of Watts and Letorney. Plaintiffs have never received any "correspondence-files" of Mammenga, Palmer, Vaughn Baker, Carroll, Melley, or Felix. See Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, ¶¶ E & F.

¹⁹ Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 355.

That, however, is exactly the dereliction of defendants' duty of which plaintiffs complain: that some unnamed "secretary or administrative assistant", together with defendants' counsel, *and not the individuals under notices or subpoenae to appear and testify*, prepared the documents central to plaintiffs' examination of the witnesses. Had Harman, for example, been personally involved in the preparation of his "correspondence-file", he could have instructed defendants' counsel to include therein the relevant documents *that were at that very time sitting on his desk.*²⁰ McFarland could have told defendants' counsel that NEA-PAC minutes, for instance, were available in files outside his immediate office.²¹ What Baker, who was "not in the office at the time", or Watts, who "wasn't even in town", might have said about their documents defendants leave this Court to conjecture.²² This Court need not conjecture, however, as to the practical result of sustaining defendants' theory that a deponent requested to produce documents

²⁰ Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 149. This points up the silliness of defendants' remark that "[i]t is typical in the real world for a secretary or administrative assistant to be more knowledgeable about the files and filing system [than her supervisor]". Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 355. The issue is not who is "more knowledgeable", but whether plaintiffs have received that to which they are entitled, and who—the deponents or some unidentified "secretary or administrative assistant"—was responsible for seeing to it that all documents plaintiffs requested were produced. In Harman's case, evidently Harman was "more knowledgeable", since he knew where the documents were, and the "secretary or administrative assistant" apparently did not. But, in any event, Harman is responsible for their non-production, not the "secretary".

²¹ Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 159-60.

²² *Id.* at 155-64.

subject to Federal Rule 34 or 45 can hide behind his "secretary or administrative assistant" with respect to any non-compliance charged by the discovering party. To sustain that theory will open a Pandora's Box of evasions, otherwise needless motions to compel production, and endless supervision and review of discovery-procedures by this Court and the Magistrates.

Defendants also try to excuse their conduct by explaining that

Alice Morton specifically directed defendants' counsel to the documents which were responsive to the plaintiffs' request."

What defendants do not say is that, from a mass of documents all arguably relevant to plaintiffs' request and within Magistrate Renner's Order, defendants' counsel "pulled what he thought was relevant, was of importance"—and that, later and under pressure from plaintiffs' counsel, defendants' counsel admitted that defendants had *not* produced all relevant materials from the NEA Archives."

Defendants then attack plaintiffs for supposedly

assuming how many drawers are in a file cabinet * * *, assuming that *all* of the documents contained in an *estimated* number of file drawers were responsive to the plaintiffs' request when in fact the plaintiffs' requests were limited to the time frame of 1971 to the

" Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 355.

" Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 162, 169-71. The conduct of defendants' counsel with respect to production of the archival materials exemplifies the brazen nature of their suppression of material evidence in this case. If they dare to engage in such activities on the record, what enormities may they not have committed in private?

present and did not include all of the types of documents maintained by the deponents."

Rather than exonerating themselves with this statement, though, defendants simply admit that they *did withhold* documents from plaintiffs, documents that they never bothered to identify or for the withholding of which they never proffered any legal justification. Apparently, defendants believe that they have some unilateral privilege under the Federal Rules to decide for themselves what documents fall within some "time frame", are relevant to the issues in this case, and are different in "type" (whatever that means) from those plaintiffs requested—and that they can exercise this privilege by withholding whatever documents they like, without divulging their conduct to plaintiffs or this Court. Such a privilege, however, does not exist. Relevance is a matter for the Court to decide, upon proper notice and hearing, not for defendants to determine in secrecy."²²

²² Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 355.

²³ A particularly egregious example of such withholding on a secret theory of "irrelevance" concerns materials connected with the NEA's "Project 18" and the Youth Franchise Coalition. These materials are collected in the NEA Archives. But defendants did not produce them in response to Magistrate Renner's Order. Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 186-87. Defendants' excuse for this non-production is that

these activities were solely in regard to gaining the right to vote for 18 year old citizens and, therefore, *were not relevant to the scope of the subpoena duces tecum which covered only documents concerning the political campaigns of candidates for public office.*

Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 355-56 (emphasis supplied). The purported "irrelevance" of the materials, however, defendants do not identify as the determination of this Court, or of Magistrate Renner. Who,

Finally, defendants claim that

[a]ny restriction of discovery [with respect to production of documents] has come only with the consent of plaintiffs' counsel following [Local] Rule 5 meetings. This is amply demonstrated by the fact that during the entire period of active discovery . . . , plaintiffs' have never served upon this Court or raised to the Court's attention any refusal by defendants to answer any particular . . . document demand to their complete satisfaction, save the instant motion.

. . . .

Discovery requests relating to the specific correspondence files were uniformly limited, per Rule 5 meetings, to each person's specified correspondence files, provided the files were separately maintained. . . . This agreement was necessitated by the fact that certain deponents did not maintain correspondence files, but rather filed all correspondence in the file to which the correspondence related. In order to fully and completely locate all such correspondence it would require the

then, decided that they "were not relevant to the scope of the subpoena duces tecum", and on what authority?

In any event, the materials are relevant, in the sense that term is used in Federal Rule of Civil Procedure 26. The ultimate purpose of both "Project 18" and the Youth Franchise Coalition was to prepare the groundwork for registering millions of eighteen-to-twenty-year-old voters, in the hope that these individuals would largely support the McGovern-Shriver presidential ticket in 1972. That a voter-registration drive, and all activities preparatory for and ancillary to it, do "concer[n] the political campaigns of candidates for public office" is self-evident—since the whole purpose of campaigning is to solicit votes, and the whole purpose of voter-registration is to enable citizens to help elect candidates. Voter-registration is an integral part of political campaigning. *See* Exhibit H to Plaintiffs' First Set of Requests for Admissions and Interrogatories, pt. VII.K.; NEA Political Action Series, Political Action Among Teachers at 3-4, Exhibit G to Plaintiffs' First Set of Requests for Admissions and Interrogatories.

commitment of many person hours. It was agreed by plaintiffs' counsel that this effort was not necessary and that any correspondence requests would be limited to identifiable correspondence files segregated from other files.

. . . .

[T]he specific agreement arrived at in a Local Rule 5 meeting of counsel [was] that since Mr. Bresin did not maintain a correspondence file there would be no documents produced prior to his deposition.²⁷

Here, defendants misrepresent both the facts and the law. There was never any "consent" on the part of plaintiffs' counsel that defendants could produce solely *segregated* "correspondence-files" in full satisfaction of plaintiffs' request for *complete* "correspondence-files". That, prior to their instant Motion, plaintiffs never sought to compel production of more than defendants had chosen to produce is simply another indication of plaintiffs' good-will, forbearance, and (unfortunately erroneous) assumption that, given sufficient opportunity to act in accordance with the Federal Rules, defendants would ultimately do so. Certainly plaintiffs' disinclination to consume this Court's and the Magistrates' time in endless motions to compel the production of this or that document-file cannot rationally be construed as a waiver of their privilege to seek an Order compelling discovery, as they now have. And no authority exists for the waiver that defendants claim.

Furthermore, plaintiffs never agreed that, because some deponents did not maintain segregated "correspondence-files", therefore defendants' counsel did not have to expend "many person hours" to locate all the correspondence requested. Rather, it was defendants' counsel who unilaterally informed plaintiffs that under no circumstances short of a

²⁷ Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 346, 354, 355.

court-order would such an effort be undertaken. For example, in a telephonic Local Rule 5 conference prior to the Bresin deposition, defendants' counsel Eric Miller, Esq., informed plaintiffs that Bresin's correspondence was scattered throughout the MEA-GRD's files, and then flatly stated that "I am not going to turn the MEA upside-down looking for Bresin's document's!" In other words, plaintiffs were told to take it or leave it. To call this an "agreement" is an impermissible distortion of fact.

Anxious to proceed with discovery, plaintiffs did not rush to this Court every time Mr. Miller arbitrarily refused to produce this or that document. Furthermore, the largest part of the non-production of documents of which plaintiffs complain occurred after the hearing of 13 October 1978, at a time when this Court had ordered discovery to close within two months. Obviously, if plaintiffs had consumed that time, or any significant part of it, in prosecuting motions to compel production of documents, they would have had little opportunity to conduct the depositions that have been so instrumental in exposing defendants' program of cover-up and "stonewall".

And that, evidently, was part of defendants' plan: to provoke plaintiffs into repeated recourse to Federal Rule 37, so as either to wear plaintiffs down, or to vex this Court into limiting or closing discovery.

DEPOSITION-TESTIMONY

Defendants make no attempt to answer, let alone confute, plaintiffs' showing that certain of defendants' staff-personnel testified untruthfully or incompletely in their depositions: "It is not appropriate or necessary", they claim, "to provide the Court with an item by item refutation of plaintiffs' argument."²² What defendants really mean, though, is that such a refutation is not possible; and they know it.

²² Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 357.

For example, defendants argue that "because witnesses do not testify to [evaluations and reports of involvement of UTP members in the Carter-Mondale campaign], plaintiffs charge them with lying."²⁰ What plaintiffs demonstrated, however, was that, while one witness (Harman) claimed that no such evaluations and reports existed, other deponents (Lowell, McFarland, and Vander Woude) recalled such information and also recalled that Harman was involved in collecting and reporting it.²¹

Again, defendants argue that, in plaintiffs' view, "McFarland must be lying because he cannot remember a two-year old telex."²² Plaintiffs, though, were not concerned that McFarland could not remember the telex, but rather that Harman could not plausibly explain the meeting to which the telex referred—a meeting of all state-level UTP governmental-relations directors in Washington, D.C., shortly before the 1976 presidential campaign began.²³

Similarly, defendants argue that, according to plaintiffs, Mammenga "must be lying because he has no *detailed* recollection of an *alleged* 'program' of UniServ campaign

²⁰ *Id.* at 357.

²¹ Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 237-47.

²² Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 358.

²³ Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 205-10. The reference to McFarland's testimony concerning the telex dealt with defendants' tactic of preparing witnesses to deny knowledge of UTP activities unless confronted with some document that more or less compelled them to answer truthfully. *Id.* at note 89, pp. 197-99.

participation".³³ Here, the emphasized words are revealing. Plaintiffs were not concerned that Mammenga did not testify to a *detailed* recollection of the UniServ Carter-Mondale contact program—but rather that he testified to *no knowledge at all*, even though Harman testified that the UniServ member-contact program was the *only* national program the UTP implemented on behalf of Carter-Mondale, and that the NEA had taken special pains to enlist the support of all state-level governmental-relations directors (such as Mammenga).³⁴

Again, defendants argue that "Mammenga's testimony is not inconsistent with . . . statements . . . indicating that Mammenga may have had some contact with the Carter-Mondale campaign".³⁵ They do not explain wherein lies the supposed consistency, however, or how Mammenga's testimony denying participation in or knowledge of the Carter-Mondale campaign squares with the letter ostensibly signed by Carter thanking MEA President Don Hill for the organization's campaign help, and singling out Mammenga for particularly fulsome praise.³⁶ Recognizing the serious trouble Mammenga's testimony has created for them, defen-

³³ Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 359 (emphasis supplied) (*NB*: defendants actually refer to "McFarland"; but the reference they give to plaintiffs' Memorandum indicates the person they mean is Mammenga).

³⁴ Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 229-37. Why do defendants refer to the member-contact program as "an *alleged* program of UniServ campaign participation"? Who "*alleged*" it—Harman?

³⁵ Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 359.

³⁶ Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 219-22.

dants indulge in one of their wildest flights of fantasy by claiming that that testimony is the product of "plaintiffs' counsel defin[ing] the term 'volunteer' " in a peculiar way." Reference to the Mammenga deposition, however, shows that the word "volunteer" was used in no special sense. In one question, plaintiffs' counsel referred to "volunteers" acting as political organizers or as rank-and-file campaign workers; and in another, counsel referred simply to "volunteers to work for those candidates".²¹ Since *all* political volunteers "work for . . . candidates", it is hard to see how Mammenga's denial that he had "volunteered" to aid the Carter-Mondale campaign is consistent with the letter from Carter to Don Hill (unless, perhaps, Mammenga was paid for whatever he did on Carter's behalf in the 1976 election).

Similarly, defendants claim that

plaintiffs frequently purport to "impeach" a witness by quoting a statement *dealing with a different subject*. For example, Ms. Lowell's lack of recollection concerning solicitation of campaign workers by staff is "contradicted" by her later statement concerning actual campaigning by teachers, which is supposedly "inconsistent" with Mr. Harman's lack of recollection *that certain types of staff were "loaned" to the Carter-Mondale campaign*.²²

Here, defendants have confused two different passages. Plaintiffs documented an inconsistency between Lowell's testimony that she knew nothing about the involvement of UTP members in the Carter-Mondale campaign, on the

²¹ Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 359.

²² Mammenga Deposition 220-22.

²³ Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 360 (emphasis supplied).

one hand, and her further testimony that she received information from Harman on "nuts and bolts" activities of UTP members in that campaign, on the other.⁴⁰ The testimony by Harman in which he denied knowledge of UTP or UniServ staff assigned to the Carter-Mondale campaign deals with *another* matter altogether: to wit, *Harman's* false testimony, as exposed by UTP contingency plans looking towards the assignment of staff.⁴¹ Defendants' purported example of improper impeachment by plaintiffs, then, turns out to be yet another instance of defendants' incredible misrepresentations of the record in this case.

Finally, defendants attempt to minimize the significance of the testimony of Investigator Saunders, Bresin, and Vander Woude by asking (but, revealingly, not answering) several questions and then saying in Delphic fashion, "[i]n all cases, any inconsistency is trivial and in the final analysis for the Court to weigh".⁴² Once again, defendants do not show how the "inconsistency" is "trivial". Indeed, their Motion to suppress the testimony of Saunders, Bresin, and Vander Woude that exposes the conspiracy among defendants and the "NEA's attorneys" is eloquent proof of their belief that the "inconsistency" is not only not "trivial", but even fatal to their success in this case.⁴³

In sum, defendants do not draw from two hundred and forty-three pages of evidence and argument adduced by

⁴⁰ Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 225-27.

⁴¹ *Id.* at 227-28.

⁴² Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 360.

⁴³ * * *

plaintiffs "a single instance in which they show that plaintiffs' claims are unfounded. They make no serious attempt to rehabilitate Baker, Bresin, Chesebrough, Harman, Johnson, Letorney, Lowell, Mammenga, McFarland, Sands, or Vander Woude. Instead, they interpose the foolish arguments exploded above, as "selected examples" of the "numerous flaws in plaintiffs' analysis of the testimony".⁴ If these are their "selected examples", their other examples (if any there be) must be ludicrous indeed.

Overall, then, defendants' Memorandum in Opposition amounts to an admission of massive and substantial misconduct in discovery.

II. Defendants' Arguments for Avoiding the Consequences of Their Misconduct Are Without Merit.

Having in essence confessed their misconduct, defendants attempt to avoid the consequences of that confession with two worthless arguments: namely, (i) that there has been "enough" discovery to date in this case; and (ii) that, in any event, plaintiffs' Motion comes "too late". They also cite several judicial opinions purportedly supporting their claims; but, as is typical with defendants' citation of case-authority,⁵ the decisions are not apposite.

First, defendants argue that "the thoroughness of the discovery is demonstrated by [plaintiffs'] instant papers before the Court", that "the very length of this documentation belies . . . plaintiffs' motion", that plaintiffs have

⁴Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 192-323.

⁵Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 357.

made "admissions as to the discovery they have been afforded", and that plaintiffs told the Court at the 13 October hearing that they had had enough discovery.⁴⁷ To be sure, plaintiffs have had discovery in this case. The issue, however, is whether they have had the discovery to which they are entitled under the Federal Rules—and, if they have not, if that lack of discovery is the result of defendants' wrongdoing.

Plaintiffs of course have documented for the Court the factual basis for their constitutional claims.⁴⁸ If they had not done so, the Court could properly have discredited their claim for further discovery to prove allegations that the discovery they have already had was incapable of documenting at all. But that plaintiffs have shown their factual allegations to be well-founded in the record, and the likelihood they will prevail on the law at trial and on appeal,⁴⁹ is no reason to deny them all the discovery to which they are entitled. Rather, it is a compelling reason to permit them to adduce the most complete factual record possible, particularly given the history of litigation on related issues in the Supreme Court.⁵¹

Moreover, plaintiffs have never conceded that they have "enough" discovery, or all the discovery to which they are entitled. At the 13 October 1978 hearing, plaintiffs' counsel told this Court that after certain depositions and the production of certain documents plaintiffs "think we will have all the evidence that we believe is necessary to prove the

⁴⁷ Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 338, 336, 336, 347-48.

⁴⁸ Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 46-69.

⁴⁹ *Id.* at 76-83.

⁵¹ *Id.* at 69-73.

contentions that we have made".⁵² That statement was made, however, in the context of plaintiffs' presumption that the scheduled deponents—McFarland, Baker, Bresin, Zagrabelny, Vander Woude, Pratt, Harman, Lowell, Harris, and Morton—would testify truthfully and completely, and that defendants would produce their "correspondence-files" and the NEA Archives in full. Evidently, this presumption was unfounded. And therefore the statement based on it is irrelevant to the new factual context in which plaintiffs now find themselves.

Second, defendants say that further discovery is inappropriate because "plaintiffs did nothing with respect to the claimed inadequacy of [defendants'] responses [to plaintiffs' Requests to Admit] until nine months [after the responses were served]", because at the 13 October 1978 hearing "plaintiffs' counsel did not relate to the Court any concerns", and because "plaintiffs' failed to relate any discovery problems to Magistrate Renner even though discovery matters were argued before him that day".⁵³

Obviously plaintiffs could not "relate to the Court any concerns" about McFarland, Baker, Bresin, Vander Woude, Harman, Lowell, or Morton before those individuals were deposed or the documents connected with their depositions produced (or, perhaps more properly, withheld from production). Obviously plaintiffs could not "relate to the Court any concerns" about the cover-up exposed by Investigator Saunders until after Bresin and Vander Woude had been interrogated. And obviously plaintiffs could not "relate any discovery problems to Magistrate Renner" (other than those dealing with the depositions of Morton and Reese), since the "problem" plaintiffs had identified was this Court's Order, not an Order or other

⁵² Transcript of Hearing of 13 October 1978, at 6.

⁵³ Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery 347.

action of the Magistrate. In short, plaintiffs came to this Court at the earliest possible moment after they had documented with painstaking care a complete record of defendants' malfeasance—that is, *immediately after* the series of depositions held *subsequent* to 13 October 1978, the series of depositions that form the heart of plaintiffs' Memorandum in support of their Motion to Rescind the Court's Order of 13 October 1978. Defendant's real complaint is that plaintiffs waited approximately two months before filing their Motion—two months in which they amassed the facts that substantiate that Motion. According to defendants, plaintiffs should have approached this Court *before the facts were available*. This is an amusing conception, but hardly a legal argument.

Defendants' complaint that plaintiffs have not moved to compel good-faith answers to their Requests to Admit "until nine months [after the responses were served]" is particularly ridiculous—since plaintiffs' Motion asks for *no relief of any kind with respect to the Requests*. To the contrary, the additional discovery that plaintiffs seek will compel defendants to respond in good faith to future requests to admit or suggested stipulations that go into far more depth and detail than those defendants have already denied.

In any event, defendants' "too-late" theory is without basis in law even if the facts were not all in plaintiffs' favor. Courts regularly extend discovery after having previously closed it;⁵⁴ and the extension of discovery may be ordered even at the appellate level when a case is remanded for a new trial.⁵⁵

⁵⁴ *E.g.*, *City of Rome v. United States*, 450 F. Supp. 378, 384 (D.D.C. 1978).

⁵⁵ *E.g.*, *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975).

The cases defendants cite give them no comfort or support, either:

*Zurzolo v. General Motors Corp.*²² Here, the following timetable was involved.

13 September 1973—plaintiffs counsel attended a pre-trial conference.

19 September 1974—plaintiff's counsel appeared at a status-call of the Court.

3 October 1974—plaintiffs' counsel filed a proposed final pre-trial order.

29 January 1975—the Magistrate conducted a pre-trial conference and stated in a pre-trial report that discovery was complete.

18 March 1975—trial began.

At the close of plaintiff's case on 24 March 1975, counsel filed a motion under Federal Rule 37 to preclude defendant from entering a defense because defendant had allegedly not answered certain interrogatories served on 25 September 1972. Denying the motion, the Court noted that

[t]his record shows plainly that for a period of 18 months * * * plaintiffs never once raised the issue * * * and never once suggested that discovery was not complete. In light of this record, * * * the granting of plaintiff's motion would pervert the purposes of the Federal Rules of Civil Procedure * * *. Plaintiff is not entitled to a new trial * * *."

The instant case is totally unlike *Zurzolo*. At most, plaintiffs have waited two months, not eighteen, to bring their claims before this Court. They have not gone to trial—or

²² 22 F.R. Serv. 2d 1029 (E.D. Pa. 1975).

²³ *Id.* at 1030-31.

even to a pre-trial conference—"and never once suggested that discovery was not complete". Moreover, plaintiffs do not seek to strike any of defendants' defenses, to have a new trial (or even any trial at all), or to do anything else but discover evidence that will permit this Court to decide the constitutional issues in this case on a motion for summary judgment based on stipulations of fact. And the granting of plaintiffs' Motion will hardly "pervert the purposes of the Federal Rules"; rather, it will correct the perversion of those Rules already occasioned by defendants' misconduct.

*Price v. Maryland Casualty Co.*²² Here, the following timetable was involved.

- 1 June 1972—with the signed approval of plaintiff's counsel, the Court entered a protective order stating that representatives of defendant were not required to furnish certain information.
- 18 July 1972—plaintiff deposed certain representatives of defendants who refused to answer questions based on the protective order.
- 15 December 1973—discovery ended.
- 31 July 1974—with trial scheduled to begin on 16 September 1974, plaintiff requested further discovery.

The Court ruled that plaintiff had been inexcusably dilatory in pursuing discovery, and that his new request would further delay the case.²³ Again, the instant case is factually different from *Price*. Plaintiffs have not waited two years to file their Motion based on the depositions of McFarland, Baker, and the others, and certainly have not waited until

²² 561 F.2d 609 (5th Cir. 1977).

²³ *Id.* at 611.

the very eve of trial to raise requests for further discovery. Rather, plaintiffs filed their Motion at the very earliest opportunity after the depositions of McFarland, Baker, and so on—before discovery terminated, before this Court's scheduled pre-trial conference, and before any decisions had been made as to when a trial would be held.

*Butkowski v. General Motors Corp.*⁴⁰ Here, the Court's opinion demonstrates conclusively the irrelevance of this decision:

Plaintiffs' motions for discovery relating to the recall campaign were not made until * * * after the parties had assured the magistrate that all pre-trial steps had been completed, after the case had been referred to the court for trial * * *. Moreover, the discovery sought concerned an entirely different defect from the one that plaintiff claimed caused the accident. The recall campaign was aimed at correction of a defect which would cause the idler arm to separate * * *; plaintiff never alleged that the idler arm separated, contending rather that it froze. * * * [T]he discovery motions were untimely and "irrelevant and immaterial to the issues in this case."⁴¹

In the instant case, no one denies that the discovery plaintiffs seek is of the highest relevance.

*Anco Engineering Co. v. Bud Radio, Inc.*⁴² Here, "the defendant * * * filed its motion to compel * * * nine months after the interrogatories were answered". Denying the motion, the Court ruled that "under the facts peculiar to this case [the motion] was not filed within a reasonable time". The Court did not say, however, what "the facts

⁴⁰ 497 F.2d 1158 (2d Cir. 1974).

⁴¹ *Id.* at 1159 (footnotes omitted).

⁴² 8 F.R. Serv. 2d 37a.12 (D. Ohio 1963).

peculiar to this case" were. In the instant case, plaintiffs have not waited nine months to file their Motion. And absent any knowledge of what "peculiar facts" were involved in *Anco* that might militate against the peculiar facts adduced by plaintiffs exposing defendants' cover-up, *Anco* has no value.

*Hampton v. Pennsylvania R.R.*⁴³ Here, plaintiff filed a motion under Federal Rule 37 to redepose certain individuals and require them to answer certain specific and general questions. Denying the motion, the Court held that

all of the information relevant to the issues raised in this case necessary to the proper preparation of the same have been made available to counsel for plaintiff.⁴⁴

In the instant case, plaintiffs have exhaustively demonstrated that defendants have withheld, destroyed, or testified falsely or incompletely concerning information and materials relevant to the issues plaintiffs raise in their Amended Complaint. *Hampton*, therefore, is irrelevant.

In sum, none of the cases defendants cite is authority for denying the relief plaintiffs request in their Motion.

⁴³ 30 F.R.D. 70 (E.D. Pa. 1962), mistakenly captioned by defendants as *United States v. De Vincentis*.

⁴⁴ *Id.* at 71.

CONCLUSION

For the reasons given above and in their Memorandum in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, this Court should grant that Motion.

Respectfully submitted,

/s/ DR. EDWIN VIEIRA, JR.
Edwin Vieira, Jr.
12408 Greenhill Drive
Silver Spring, Maryland 20904
301-622-2804

/s/ JOHN J. FOGARTY
John J. Fogarty
8316 Arlington Boulevard
Fairfax, Virginia 22038
703-573-7010

Attorneys for plaintiffs

Done this 1st day of February, 1979.

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APPENDIX G

PLAINTIFFS' MEMORANDUM EXPLAINING THE INTERRELATIONSHIP AMONG FURTHER DISCOVERY, STIPULATIONS, AND TRIAL •

Dated 22 February 1979

• *N.B.* All internal page-references in this document have been conformed to the pagination used in these Appendices.

APPENDIX C

THE CHINESE ECONOMY DURING THE
RECENT YEARS AND THE
RECENT DEVELOPMENTS AND THE

RECENT DEVELOPMENTS AND THE

IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-74 Civ. 659

LEON KNIGHT, *et al.*, *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASS'N, *et al.*,
Defendants.

**PLAINTIFFS' MEMORANDUM EXPLAINING THE INTER-
RELATIONSHIP AMONG FURTHER DISCOVERY,
STIPULATIONS, AND TRIAL**

EDWIN VIEIRA, JR.
12408 Greenhill Drive
Silver Spring, Maryland 20904
(301)-622-2804

JOHN J. FOGARTY
8316 Arlington Boulevard
Fairfax, Virginia 22038
(703)-573-7010

Attorneys for Plaintiffs

Of Counsel:

RAYMOND J. LAJEUNESSE, JR.
8316 Arlington Boulevard
Fairfax, Virginia 22038
(703)-573-7010

IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-74 Civ. 659

LEON KNIGHT, *et al.*, *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASS'N, *et al.*,
Defendants.

In light of the Court's concerns expressed at the hearing of 2 February 1979, plaintiffs submit this Memorandum to explain their position on the interrelationship among further discovery, stipulations, and trial in this case.

1. For this case to proceed to judgment without trial, defendants must stipulate that the United Teaching Profession (UTP) is an integrated organization essentially and substantially engaged in electoral and party politics, lobbying, agitation and propaganda, litigation, and coalition-activity with other political groups and movements. Plaintiffs have already explained their theory of the case that the UTP is a special-interest political party, or political pressure-group, and (as such) is disqualified under *Elrod v. Burns* and *Abood v. Board of Education* from claiming to serve under color of Minnesota law as plaintiffs' "spokesman" or "sponsor" for any purpose.¹ And plaintiffs have already presented this Court *prima facie*

¹ *Elrod v. Burns*, 427 U.S. 347 (1976); *Abood v. Board of Educ.*, 431 U.S. 209 (1977).

evidence substantiating their constitutional claims.² A *prima facie* showing, however, does not preclude defendant UTP from introducing what it purports to be evidence in rebuttal; it only precludes the Court from granting the UTP summary judgment on the facts.³

At both the 13 October 1978 and 2 February 1979 hearings, plaintiffs emphasized to this Court their desire to proceed through a motion for summary judgment. This desire presumes, though, that there will be no material facts in issue when the Court hears such a motion—and, therefore, also presumes that defendant UTP will have stipulated to the basic fact that it is, for all purposes of constitutional law associated with this case, a special-interest political party, or political pressure-group. In essence, the necessary stipulation must include the findings of plaintiffs' expert in organizational analysis, who concluded that:

(a) The UTP is a formal, complex organization consisting of various "units", or "levels", of which the National Education Association constitutes the national level, and the Minnesota Education Association and the Minnesota Community College Faculty Association are representative of numerous affiliates at the state and local levels, respectively.

(b) The UTP has differentiated itself into units operating at the local, state, and national levels in order to deal effectively with various jurisdictions of government, including local school-boards, state legislatures, and the United States Congress.

(c) Although geographically differentiated, each unit of the UTP is an integral element of a single, nationwide organization.

² Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 49-69.

³ On the law, plaintiffs prevail. *Id.* at 76-83.

(d) Political activism—in terms of electoral and party politics, lobbying, propaganda and agitation, litigation, and coalitions with other political groups—is pervasive and substantial throughout the UTP.

(e) From the organization's own point of view, such political activism is essential to the achievement of the UTP's goals, objectives, and programs.⁴

Experience suggests that defendant UTP will not so stipulate. Indeed, presented with plaintiffs' Requests to Admit pursuant to Federal Rule of Civil Procedure 36, the UTP responded in bad faith, as plaintiffs have documented.⁵ Two points are crucial here: First, the facts the UTP refused to admit all underlie and are part of the basic fact, outlined above, of the UTP's character as a special-interest political party, or pressure-group. Second, since Rule 36 is coercive in nature, whereas stipulations are wholly consensual, the UTP's stipulating to facts it has already denied in bad faith is unlikely.

If the UTP will not stipulate to the basic fact of its essentially political character, there must be a trial. In all likelihood, it will be a jury-trial. Moreover, the trial will cover much of the evidence already adduced through discovery, since all the evidence in this case supports the basic fact of the UTP's essential and substantial involvement in political activism. And finally, the trial will no doubt be complex and prolonged. For example, plaintiffs' expert in organizational science, Dr. Craig Schneier, testified for two days in deposition. Plaintiffs anticipate that his testimony at trial, together with introduction and explanation of all the UTP documents he used in his analysis, might consume ten to fourteen days. And plaintiffs may call additional ex-

⁴ *Id.* at 62-63.

⁵ *Id.* at 83-137.

pert witnesses to elaborate other aspects of the UTP's political nature and activities.

2. Granting plaintiffs' Motion for discovery will encourage meaningful stipulations by the UTP, and thereby perhaps resolve the constitutional issues in this case without trial. Plaintiffs' painstakingly documented showing that defendant UTP has engaged in a program of "stonewalling" establishes their right to further discovery in preparation for trial. However, if this Court grants plaintiffs' Motion, defendant UTP will probably stipulate to the basic fact of its essentially political character. After all, the UTP knows what its files contain, and that once plaintiffs have direct access to those files no jury will likely fail to find that the UTP is, in fact, a special-interest political party, or political pressure-group. Therefore, the best way to avoid a trial in this case is for the Court to grant plaintiffs' Motion.*

3. Denying plaintiffs' Motion will necessitate at least one trial on the merits, and probably two. To be sure, if this Court denies plaintiffs' Motion for further discovery, and plaintiffs nevertheless prevail at trial, only one trial will be had. But, if the Court denies plaintiffs' Motion, and plaintiffs then lose at trial because of lack of factual proof, a second trial is almost assured. As plaintiffs have emphasized, the Supreme Court has repeatedly urged inferior courts to develop complete factual records in cases of this kind.⁷ That the Supreme Court would not reverse any judgment against plaintiffs—especially after plaintiffs had been

* Practically speaking, the Court gains nothing by denying plaintiffs' Motion and having a trial, since plaintiffs can and will simply call the desired deponents as witnesses, and subpoena the necessary UTP files. Plaintiffs, however, may suffer a denial of due process, since some of the documentary materials to which they are entitled have been, or even now are being, destroyed. *Id.* at 190-92.

⁷ *Id.* at 49 n.8, 69-76.

erroneously denied necessary discovery in the face of an exposed cover-up on the UTP's part—is therefore improbable in the extreme. And, under the posited circumstances, a second trial would be necessary. That such a result would unconscionably waste judicial resources goes without emphasis.

In sum, to deny plaintiffs' Motion for further discovery is to render unlikely meaningful stipulations on defendant UTP's part, and to compel a lengthy and difficult jury-trial on the merits.

Respectfully submitted,

/s/ DR. EDWIN VIEIRA, JR.

Edwin Vieira, Jr.

12408 Greenhill Drive

Silver Spring, Maryland 20904

(301)-622-2804

/s/ JOHN J. FOGARTY

John J. Fogarty

8316 Arlington Boulevard

Fairfax, Virginia 22038

(703)-573-7010

Attorneys for Plaintiffs

Done this 22d day of February, 1979.

APPENDIX H
STATEMENT OF DEFENDANT LABOR
ORGANIZATIONS

Dated 19 March 1979



The first of these is the fact that the
 government has been unable to raise
 the necessary funds to carry out its
 policy of non-interference in the
 internal affairs of the country.

The second is the fact that the
 government has been unable to raise
 the necessary funds to carry out its
 policy of non-interference in the
 internal affairs of the country.

The third is the fact that the
 government has been unable to raise
 the necessary funds to carry out its
 policy of non-interference in the
 internal affairs of the country.

The fourth is the fact that the
 government has been unable to raise
 the necessary funds to carry out its
 policy of non-interference in the
 internal affairs of the country.

The fifth is the fact that the
 government has been unable to raise
 the necessary funds to carry out its
 policy of non-interference in the
 internal affairs of the country.

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. No. 4-74-659

STATEMENT OF DEFENDANT LABOR ORGANIZATIONS

LEON KNIGHT, et al., *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, et al.,
Defendants.

INTRODUCTION

This statement is submitted in response to Plaintiffs' Memorandum Explaining the Interrelationship Among Further Discovery, Stipulations, and Trial.

STATEMENT

Plaintiffs take the position that if Defendants will not stipulate that Defendant labor organizations are a "special-interest political party," there must be a trial. Plaintiffs' position in this regard is typical of their approach to stipulations and Rule 36 Requests for Admission throughout this litigation. Unsatisfied with admissions as to factual data, Plaintiffs persist in demanding that the ultimate conclusions believed necessary to their constitutional arguments be admitted as well. From their ideological perspective, Plaintiffs may well believe it to be a "fact" that Defendant labor organizations are a political party. Defendants believe this a matter to be determined by the court.

Defendants are willing to stipulate and have in the past admitted to underlying factual data deemed relevant by Plaintiffs to resolution of the question. Further discovery

is unwarranted: Plaintiffs have had more than ample opportunity to discover factual data through a variety of means, and the conclusory, ideologically-tinted admissions sought by Plaintiffs would not be prompted by anything forthcoming in the additional proceedings. Plaintiffs have not been thwarted by any "conspiracy" of the Defendants to "Stonewall"—the late date at which Plaintiffs make this motion, its inconsistency with prior statements to the court, and the massive amount of discovery enjoyed indicate as much. Plaintiffs are thwarted only by their unwillingness to accept less than a stipulation to their legal conclusions.

CONCLUSION

Plaintiffs' motion should be denied.

OPPENHEIMER, WOLFF, FOSTER,
SHEPARD AND DONNELLY

DATED: March 19, 1979

By /s/ ERIC R. MILLER
Eric R. Miller
KEITH E. GOODWIN
DONALD W. SELZER, JR.
1700 First National Bank Bldg.
Saint Paul, Minnesota 55101
(612) 227-7271

Attorneys for Defendants
National Education Association,
its affiliates and its
officials and staff personnel

APPENDIX I

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN REPLY TO DEFENDANTS' RESPONSIVE MEMORAN- DUM AND TO THE STATEMENT OF DEFENDANT LABOR ORGANIZATIONS*

Dated 28 March 1979

* N.B. Portions of this Memorandum not relevant to the Petition for an Extraordinary Writ have been excised; and all internal page-references in this document have been conformed to the pagination used in these Appendices.

THE FIRST PART OF THE HISTORY OF THE
REIGN OF CHARLES THE FIRST
BY JOHN BURNET
OF THE UNIVERSITY OF OXFORD
IN TWO VOLUMES
THE FIRST

THE SECOND PART OF THE HISTORY OF THE
REIGN OF CHARLES THE FIRST
BY JOHN BURNET
OF THE UNIVERSITY OF OXFORD
IN TWO VOLUMES
THE SECOND

THE HISTORY OF THE
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THE FIRST

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IN TWO VOLUMES
THE SECOND

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOR THE
FOURTH DIVISION

No. 4-74 Civ. 659

LEON KNIGHT, *et al.*, *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASS'N, *et al.*,
Defendants.

**PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN REPLY
TO DEFENDANTS' RESPONSIVE MEMORANDUM AND TO
THE STATEMENT OF DEFENDANT LABOR
ORGANIZATIONS**

EDWIN VIEIRA, JR.
12408 Greenhill Drive
Silver Spring, Maryland 20904
(301)-622-2804

JOHN J. FOGARTY
8316 Arlington Boulevard
Fairfax, Virginia 22038
(703)-573-7010

Attorneys for Plaintiffs

Of Counsel:

RAYMOND J. LAJEUNESSE, JR.
8316 Arlington Boulevard
Fairfax, Virginia 22038
(703)-573-7010

IN THE
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No. 4-74 Civ. 659

LEON KNIGHT, *et al.*, *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASS'N, *et al.*,
Defendants.

INTRODUCTION

Plaintiffs submit this Supplemental Memorandum to apprise the Court of further authority in support of their position that (I) an extension of discovery is necessary in this case * * *.

I. Denial of an Extension of Discovery Will Unconscionably Prolong the Prosecution of This Case.

As the Supreme Court has recognized, "[t]he greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization".¹ Here, however, defendants NEA, MEA, MCCFA, and IMPACE have deliberately and wrongfully withheld records and documents to the discovery of which plaintiffs are entitled. In some instances, plaintiffs have obtained copies of important documents from sources other than defendants.² But many ma-

¹ United States v. White, 322 U.S. 694, 700 (1944).

² *E.g.*, plaintiffs first learned of the NEA's plan for intervention in the 1976 presidential elections, not from defendants' officials and staff-personnel whom they deposed (and who testified that

terials remain to be uncovered—although they no doubt will be hereafter in other litigation.³ None the less, the danger remains that plaintiffs will be denied the opportunity to present their case with a fully documented record on a motion for summary judgment, and that therefore a trial—or perhaps *two* trials—will be necessary.

*Rozier v. Ford Motor Co.*⁴ illustrates the latter problem. There, the Fifth Circuit Court of Appeals held that a trial-court abused its discretion by denying Rozier a new trial after she discovered that Ford had failed to disclose relevant information called for through discovery and court-order. As here, the defendant in *Rozier* claimed during discovery that it had not prepared certain documents and could not find others. Almost a year after Ford prevailed at trial, however, Rozier's counsel obtained a copy of a document Ford had said it did not have.⁵

such a plan did not exist), but instead from a doctoral dissertation. See Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 140-41, 193-213. Later, during the deposition of Matt Reese, a private political-action consultant for the NEA, plaintiffs discovered a copy of the plan—a copy, admitted Reese, that may well have come from either Stanley McFarland or Robert Harman, NEA staff-men who had earlier testified that they knew of no such plan. See Reese Deposition 179-84.

³ Numerous lawsuits are now pending across the country against the NEA and various of its affiliates concerning issues related to those raised in this case. *E.g.*, *Jensen v. Noburo Yonamine*, Civil No. 75-405 (D. Hawaii, proceedings stayed); *Kalamazoo Educ. Ass'n v. Board of Educ.*, CA B77-4-00-008 AV (Mich. Cir. Ct., preliminary injunction entered 30 Mar. 1978); *Link v. Antioch Unified School Dist.*, No. 185356 (Cal. Sup. Ct., filed 31 Mar. 1978); *Youngstown State Univ. Educ. Ass'n v. Secrist*, No. 76-CV-564 (Ohio Dist. Ct. App., appeal filed 21 Feb. 1979).

⁴ 573 F.2d 1332 (5th Cir. 1978).

⁵ *Id.* at 1340.

Reversing the trial-court's ruling that a new trial was not warranted, the Court of Appeals noted that

[i]nvariably, information developed in the discovery stages of the case influenced the decision as to which theories would be emphasized at trial. We are left with the firm conviction that disclosure of the [withheld document] would "have made a difference in the way plaintiff's counsel approached the case or prepared for trial", * * * and that Mrs. Rozier was prejudiced by Ford's nondisclosure.*

Therefore, concluded the Court,

[t]hrough its misconduct in this case, Ford completely sabotaged the federal trial machinery, precluding the "fair contest" which the Federal Rules of Civil Procedure are intended to assure. Instead of serving as a vehicle for ascertainment of the truth, the trial in this case accomplished little more than the adjudication of a hypothetical fact situation imposed by Ford's selective disclosure of information.⁷

Rozier, of course, dealt with products-liability and negligence. But, if a new trial was appropriate relief in that case for misconduct that led to "the adjudication of a hypothetical fact situation", how much more would it be necessary here, where *constitutional* issues are involved, where the information withheld is unquestionably central to "ascertainment of the truth", and where plaintiffs have documented defendants' massive program of "covering-up" and "stonewalling"?⁸

* *Id.* at 1342.

⁷ *Id.* at 1346.

⁸ On the first point, see *United States v. Raines*, 362 U.S. 17, 21-22 (1960) (power to declare statutes unconstitutional "not to be exercised with reference to hypothetical cases").

Plaintiffs' request for an extension of discovery, then, is warranted three-fold: First, the Federal Rules of Civil Procedure entitle plaintiffs to full disclosure of all relevant evidence in defendants' possession.* Second, extending discovery now may avoid a protracted jury-trial; whereas, denying further discovery will simply shift the locus of evidence-production from the discovery-process to the courtroom. And third, should plaintiffs lose at trial because of their inability to introduce documents defendants have wrongfully withheld, the Supreme Court on appeal will probably (if not certainly) order a new trial—further consuming the scarce resources of this Court.

Defendants make no serious effort to contravert any of these reasons for extending discovery. Instead, as their most recent Statement of Defendant Labor Organizations shows, they rely on misrepresentations and threats. First, they claim that plaintiffs are demanding stipulations or admissions of "legal conclusions". Why such a demand (if plaintiffs had made it) is objectionable under the Federal Rules of Civil Procedure defendants do not explain. In any event, plaintiffs have never requested that defendants stipulate to or admit legal conclusions. Plaintiffs' position is now, as it always has been, that the various political activities in which the UTP engages are *facts*, that the extent to which the organization engages in these activities is a *fact*, that the intention of the leaders of the organization to engage to a substantial degree in these activities is a *fact*, and that the essentiality of these activities to the goals of the organization (as perceived by its leaders) is a *fact*. Plaintiffs add that an organization characterized by such *facts* could be described as a species of "political party" or "political pressure-group"; but that conclusion is also a

* Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 80-83 *et passim*.

fact—just as is the conclusion that an animal characterized by certain facts is a “horse” or a “cow”. Plaintiffs’ *legal* conclusion is that an organization such as the UTP, which as a fact engages in various political activities to a determinate extent, is constitutionally disabled from exercising the special privileges of an exclusive representative under color of state law. Plaintiffs have never asked defendants to stipulate to or admit this conclusion, however. What bothers defendants is that, if they were to stipulate to or admit the factual nature and extent of political involvement by the UTP, the legal conclusion plaintiffs urge would be self-evident to this, or any other, Court. Unfortunately for them, no rule of law permits a party to refuse to admit facts simply because those admissions are fatal to its legal position.

Second, defendants claim that they have admitted “underlying factual data deemed relevant by Plaintiffs”. The question is, however, have defendants stipulated to or admitted what the record establishes they should have conceded? The answer is no.¹⁰

Third, defendants say that “Plaintiffs have had more than ample opportunity to discover factual data”. What defendants do not say is that plaintiffs’ “opportunity” defendants’ own wrongdoing frustrated. Defendants advance the novel notion that “[f]urther discovery is unwarranted” where: (i) the Court establishes a termination date for discovery premised on the assumption that the party providing discovery will do so in good faith; and (ii) that party then engages in a cover-up, wrongfully frustrating discovery. That such a notion, if adopted by the courts, would throw the process of discovery into chaos, and make the judiciary a complicitor in whatever fraud or illegality a party seeking to avoid discovery chose to employ, defendants do not mention.

¹⁰ *Id.* at 83-139.

Fourth, defendants darkly predict that "admissions sought by Plaintiffs would not be prompted by anything forthcoming in the additional proceedings"—an oblique reference to plaintiffs' assessment that further discovery will encourage defendants to think seriously about stipulations and admissions.¹¹ How defendants' counsel know what will "not be prompted" by further discovery goes unexplained. Is it possible—or even conceivable—that counsel have perused the extensive UTP files in the District of Columbia, Minnesota, and elsewhere throughout the United States, and thereby gained personal knowledge that those files contain no relevant materials other than what defendants have already produced? Or are they perhaps suggesting that further discovery will fail to elicit more information because defendants have destroyed, or are in the process of destroying, material evidence in this case?¹² Or are counsel perhaps implying that, irrespective of an Order from this Court mandating production of documents and depositions, defendants will continue to suppress evidence, to give false or incomplete testimony, and generally to "stonewall"? Or are they perhaps threatening that, notwithstanding the evidence plaintiffs adduce through further discovery, defendants will force this case to a protracted jury-trial at which they will stubbornly attempt to deny what the record proves? Whatever its exact meaning, counsels' warning points up the perverse attitude with which plaintiffs have contended throughout the course of discovery in this case, and which makes im-

¹¹ Plaintiffs' Memorandum Explaining the Interrelationship Among Further Discovery, Stipulations, and Trial 403.

¹² See Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978, at 190-92.

perative immediate and unequivocal intervention by this Court.

. . . .

/s/ DR. EDWIN VIEIRA, JR.
Edwin Vieira, Jr.
12408 Greenhill Drive
Silver Spring, Maryland 20904
(301)-622-2804

/s/ JOHN J. FOGARTY
John J. Fogarty
8316 Arlington Boulevard
Fairfax, Virginia 22038
(703)-573-7010
Attorneys for Plaintiffs

Done this 28th day of March, 1979.

APPENDIX J

**ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA***

Dated 4 April 1979

* *N.B.* Portions of this Order not relevant to the Petition for an Extraordinary Writ have been excised.

THE UNITED STATES OF AMERICA
DISTRICT OF COLUMBIA

IN SENATE
JANUARY 10, 1906
REPORT
OF THE
COMMISSIONER OF THE DISTRICT OF COLUMBIA

FOR THE YEAR 1905

PRINTED BY THE UNITED STATES GOVERNMENT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON: 1906

11

THE DISTRICT OF COLUMBIA
COMMISSIONER OF THE DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-74 Civ. 659

LEON W. KNIGHT, *et al.*, *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, *et al.*,
Defendants.

ORDER

This matter comes before the court upon the following motions:

1. A motion of the plaintiffs for an order rescinding this court's order of October 13, 1978 (sic October 16, 1978) and entering an order commanding the production of certain files maintained by, the depositions of certain staff personnel of, and the payment of certain costs and fees by defendants National Education Association, Minnesota Education Association, Minnesota Community College Faculty Association, and Independent Minnesota Political Action Committee for Education.

* * * *

The court having met and considered the matter, and upon all files, records and proceedings herein,

IT IS ORDERED That the motion of the plaintiffs as hereinabove set forth be and the same hereby is in all things denied.

* * * *

IT IS FURTHER ORDERED:

1. On or before May 7, 1979 each of the parties hereto shall, by and through their counsel and if necessary by their

personal presence, meet, prepare, and enter into a stipulation of undisputed facts. Such stipulation shall set forth, seriatim, such facts as are undisputed or about which there is no genuine issue, without regard to the relevancy thereof. If the court finds that any party to the action has failed to reasonably comply with the terms of this order, it shall invoke the sanctions of Rule 37 of the Federal Rules of Civil Procedure, together with such other sanctions as are available to it.

2. On or before May 21, 1979, counsel for each party shall prepare, file and serve upon opposing counsel a statement setting forth all facts in issue which remain unresolved and which it proposes to submit to the court for determination.

3. On or before June 4, 1979, counsel for each party shall prepare, serve and file a schedule of all exhibits which will be offered in evidence at the trial as part of its case in chief.

4. On or before June 4, 1979, counsel for each party shall mark for identification in the sequence proposed to be offered all exhibits intended to be offered at trial.

5. On or before June 4, 1979, counsel for each party shall prepare, serve and file a schedule of depositions or portions thereof it proposes to offer in evidence.

6. On or before June 4, 1979, counsel for each party shall prepare, serve and file a schedule of interrogatories and answers to interrogatories that it proposes to offer in evidence.

7. On or before June 4, 1979, counsel for each party shall prepare, serve and file a full and complete statement of the facts it proposes to prove as part of its case in chief, setting forth such facts in separately numbered para-

(a) references to stipulations, depositions, or responses to Interrogatories, by page and number, as to each such fact;

(b) the name and address of each witness who might be called to testify and a brief summary of the substance of the testimony of each such witness.

8. On or before June 18, 1979, each party shall file a detailed written brief setting forth separately the legal issues for determination by this court, the relief sought by the plaintiffs, the defenses, including affirmative defenses of the defendants to plaintiffs' claims, and a precise statement of the legal contentions of the party filing the brief with identification of the authorities claimed to support such positions. Such briefs shall not exceed fifty (50) pages in length.

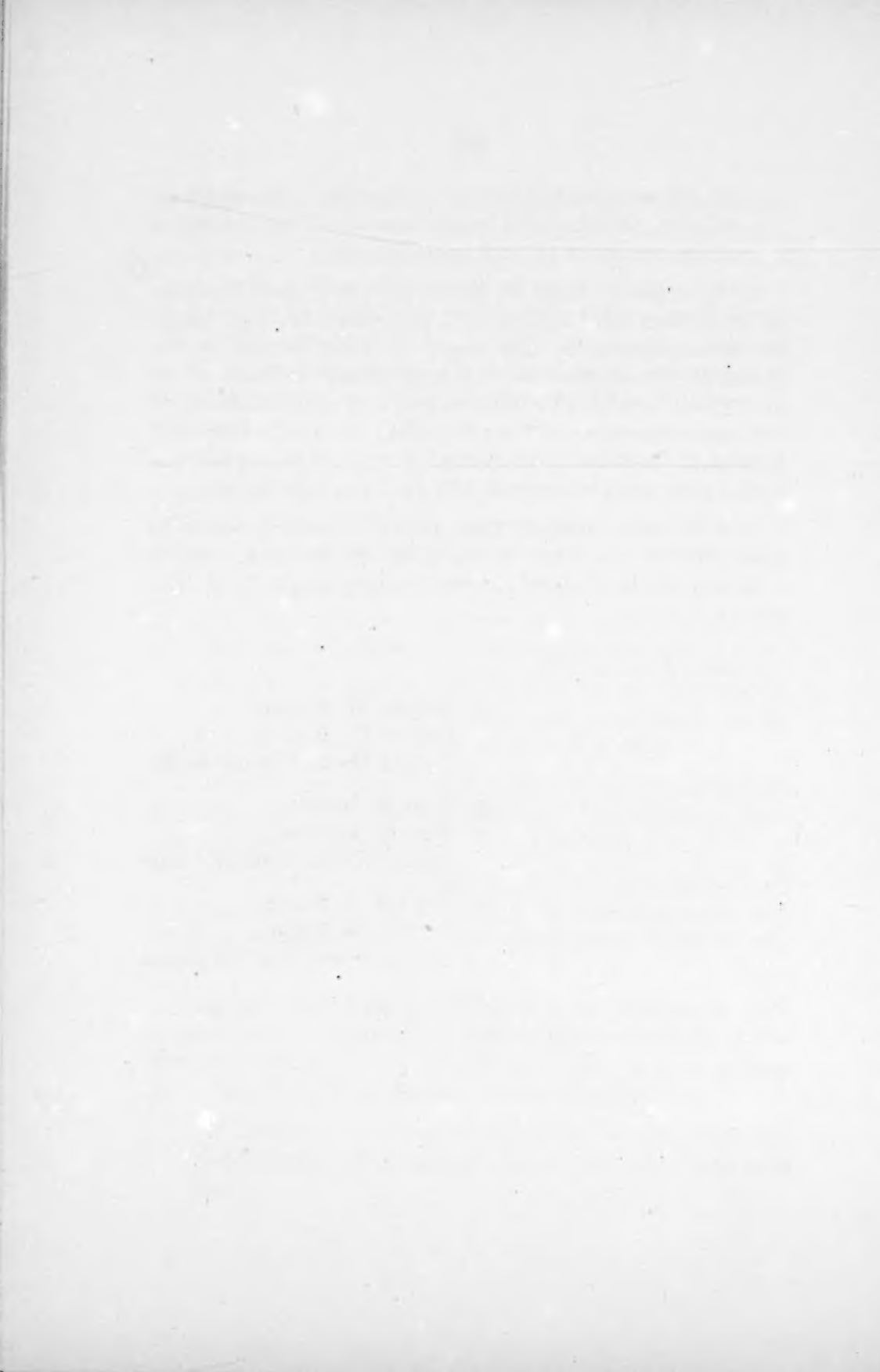
IT IS FINALLY ORDERED That a further hearing herein be conducted by the court on the 29th day of June, 1979, at 9:30 a.m. at the Federal Courts Building in St. Paul, Minnesota.

DATED: April 4, 1979.

/s/ GERALD W. HEANEY
Gerald W. Heaney
United States Circuit Judge

/s/ EARL R. LARSON
Earl R. Larson
United States District Judge

/s/ DONALD D. ALSOP
Donald D. Alsop
United States District Judge



APPENDIX K

**PLAINTIFFS' MOTION FOR DISSOLUTION OR STAY
OF THE COURT'S ORDER OF 4 APRIL 1979, AND
FOR RECONSIDERATION AND HEARING ON
PLAINTIFFS' MOTION TO RESCIND THE
COURT'S ORDER OF 13 OCTOBER 1978**

Dated 19 April 1979

IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA
FOURTH DIVISION

No. 4-74 Civ. 659

LEON KNIGHT, *et al.*, *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASS'N, *et al.*,
Defendants.

**PLAINTIFFS' MOTION FOR DISSOLUTION OR STAY
OF THE COURT'S ORDER OF 4 APRIL 1979,
AND FOR RECONSIDERATION AND HEARING ON
PLAINTIFFS' MOTION TO RESCIND
THE COURT'S ORDER OF 13 OCTOBER 1978**

Plaintiffs Leon Knight, *et alia*, hereby move this Court to dissolve or stay its Order of 4 April 1979, and to reconsider and grant oral argument on Plaintiffs' Motion to Rescind the Court's Order of 13 October 1978 [hereinafter "Plaintiffs' Motion to Rescind"], and in support of this motion say as follows:

1. Although counsel for all parties to this litigation were physically present in court on 2 February 1979 and prepared to argue the merits of Plaintiffs' Motion to Rescind, this Court chose not to permit oral argument. And the Court did not grant an opportunity for argument prior to the issuance of its Order of 4 April 1979, notwithstanding the gravity and complexity of the matters raised in Plaintiffs' Motion to Rescind.

2. This Court entered its Order of 4 April 1979 without opinion, leaving the parties to speculate on the reasons it

entertained for denying Plaintiffs' Motion to Rescind. Three lines of reasoning are possible:

First, the Court's Order of 4 April 1979 may implicitly hold that plaintiffs did not establish an illegal cover-up on the part of the UTP defendants. No evidence in the record supports this position, however. Quite the contrary: Even defendants themselves made no serious attempt to challenge plaintiffs' showing of defendants' malfeasance in discovery. If, therefore, the facts of a cover-up on defendants' part are material to plaintiffs' claims for further discovery, the Court's Order of 4 April 1979 violates the Due Process Clause of the Fifth Amendment in that it lacks any support in the record.

Second, the Court's Order of 4 April 1979 may implicitly hold that plaintiffs did establish an illegal cover-up on the part of the UTP defendants, but that such a showing does not entitle them to an extension of discovery. If so, the Order violates the Due Process Clause of the Fifth Amendment in that it judicially sanctions wrong-doing designed to frustrate the administration of justice. Moreover, the Order creates new and perhaps unresolvable problems in the application of the Federal Rules of Civil Procedure—effectively licensing unscrupulous parties to nullify the discovery-rules through false and incomplete testimony, and the suppression and destruction of documentary evidence. Furthermore, the Order irreparably injures plaintiffs, by arbitrarily denying them material evidence that they have proven exists in the UTP's files, and that they have shown the UTP may be in the process of destroying. Defendants' suppression of such evidence, now condoned by this Court, may render a meaningful trial impossible. In addition, the Court's Order sets the stage for a protracted (albeit nugatory) trial, appeal to the Supreme Court, and reversal and remand for further discovery and a new trial, thus guaranteeing a substantial waste of judicial resources, including those of the Supreme Court.

Third, the Court's Order of 4 April 1979 may implicitly hold that the facts surrounding defendants' illegal cover-up are irrelevant, and that this Court may terminate discovery whenever it feels that a party has had "enough" time, or has amassed "enough" evidence. That a time-limit might be established in the usual case (which plaintiffs need not gain-say) does not support the establishment or enforcement of such a limit where, as here, much of the time expended in discovery has been consumed in fighting and exposing defendants' bad faith and malfeasance in discovery. And that plaintiffs have amassed some evidence does not support a denial of their privilege to adduce more—particularly where they have proven that much highly material evidence exists in defendants' possession, that defendants have withheld and testified falsely concerning it, and that defendants are even now destroying or otherwise sequestering it. Moreover, it is hardly meet for this Court to suggest that plaintiffs have "enough" evidence when: (i) the Court has had no opportunity seriously to examine the evidence already obtained, most of the depositions and exhibits in this case not even having been filed until most recently; and (ii) the Supreme Court has made clear that "[i]n our adversary system, it is enough for judges to judge. The determination of what may be useful to [a party] can properly and effectively be made only by an advocate". *Dennis v. United States*, 384 U.S. 855, 875 (1966).

3. Plaintiffs shall endeavor to comply fully with this Court's Order of 4 April 1979 so long as that Order is in force. However, plaintiffs believe that the Order so disregards the evidence of defendants' wrong-doing submitted by plaintiffs, so sanctions and rewards that wrong-doing while penalizing and handicapping plaintiffs in the presentation of their case, and thereby so offends the Federal Rules of Civil Procedure and the Fifth Amendment, that its entry and enforcement constitute an abuse of this Court's discretion properly subject to review by extraordinary writ in the Supreme Court. See *United States Alkali Export Ass'n, Inc. v. United States*, 325 U.S. 196, 201-02 (1945).

WHEREFORE, plaintiffs respectfully pray that this Court:

A. DISSOLVE its Order of 4 April 1979, and set down for hearing Plaintiffs' Motion to Rescind; or

B. STAY the enforcement of its Order of 4 April 1979 pending review thereof by the United States Supreme Court.

Respectfully submitted,

/s/ DR. EDWIN VIERA, JR.
Edwin Vieira, Jr.
12408 Greenhill Drive
Silver Spring, Maryland 20904
(301)-622-2804

/s/ JOHN J. FOGARTY
John J. Fogarty
8316 Arlington Boulevard
Suite 600
Fairfax, Virginia 22038
(703)-573-7010

Of counsel:

RAYMOND J. LAJEUNESSE
8316 Arlington Boulevard
Suite 600
Fairfax, Virginia 22038

Done this 19th day of April, 1979.

APPENDIX L

**DEFENDANT LABOR ORGANIZATIONS' STATEMENT
IN OPPOSITION TO PLAINTIFFS' MOTION FOR
DISSOLUTION, STAY, RECONSIDERATION
AND HEARING**

Dated 8 May 1979

THE UNITED STATES OF AMERICA
DO hereby certify that
the within and foregoing is a true and correct
copy of the original as the same appears
on the records of the Department of the Interior
at Washington, D. C.

APPENDIX A

THE UNITED STATES OF AMERICA
DO hereby certify that
the within and foregoing is a true and correct
copy of the original as the same appears
on the records of the Department of the Interior
at Washington, D. C.

INDEX TO

THE UNITED STATES OF AMERICA
DO hereby certify that
the within and foregoing is a true and correct
copy of the original as the same appears
on the records of the Department of the Interior
at Washington, D. C.

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. No. 4-74-659

LEON W. KNIGHT, *et al.*, *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, *et al.*,
Defendants.

**DEFENDANT LABOR ORGANIZATIONS' STATEMENT IN
OPPOSITION TO PLAINTIFFS' MOTION FOR DISSOLUTION,
STAY, RECONSIDERATION AND HEARING**

Defendant Employee Organizations continue to oppose the prolonged attempts of Plaintiffs to avoid the discovery deadline in this case. The Court imposed this deadline at the suggestion of Plaintiffs' counsel during a pre-trial conference on October 13, 1978. It was only on the eve of the deadline that Plaintiffs' counsel apparently had a change of heart and began a substantial effort at prolonging discovery. Discovery in this case has been exhaustive. Under these circumstances, the limitations on discovery ordered by the Court are well within its discretion.

Plaintiffs' allegations of "conspiracy" and "cover-up" have been argued at length to the Court in Plaintiffs' various memoranda. These assertions are not credible. Certainly the fact that Plaintiffs' counsel devoted great energy to attempting to substantiate their belief in some type of "conspiracy" against them is not an excuse for failing to pursue discovery on the merits. Finally, the record reflects that Plaintiffs' counsel did not fail in this regard: extensive discovery has been conducted. This fact alone makes Plaintiffs' reference to *Dennis v. United States*, 384 U.S. 855 (1966), erroneous. Plaintiffs' motion for dissolution should be denied.

Plaintiffs enjoy no right under the Federal Rules of Civil Procedure to oral argument on its discovery motion. It is difficult to imagine, given the length of the written argument already presented, that Plaintiffs need any additional opportunity to outline their contentions. Plaintiffs' motion for oral argument should be denied.

Finally, Plaintiffs' request for a stay pending appeal should be rejected. Plaintiffs' suggestion that the Court's ruling on a discovery matter is reviewable flies in the face of the accepted rule that discovery rulings of this kind are reviewable only on appeal of the case as a whole. *United States Alkali Export Ass'n, Inc. v. United States*, 325 U.S. 196 (1945), which concerned a conflict between a district court order and the functioning of a federal agency, is irrelevant to these proceedings, except insofar as it states:

The writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews.

325 U.S. at 203. Plaintiffs ought not be permitted to unreasonably delay the trial of this matter by making such a frivolous appeal. The request for stay should be denied.

OPPENHEIMER, WOLFF, FOSTER,
SHEPARD AND DONNELLY

By /s/ ERIC R. MILLER
Eric R. Miller
Keith E. Goodwin
Donald W. Selzer, Jr.
1700 First National Bank Building
Saint Paul, Minnesota 55101
Telephone: (612) 227-7271

DATED: May 8, 1979

APPENDIX M

TRANSCRIPT OF HEARING OF 13 OCTOBER 1978

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-74 Civ 659

LEON W. KNIGHT, *et al.*, Plaintiffs,

vs.

MINNESOTA COMMUNITY COLLEGE FACULTY, *et al.*,
Defendants.

Motion in the above entitled matter came on before the Honorable Donald D. Alsop, one of the Judges of the above Court, at St. Paul, Minnesota, on October 13, 1978, commencing at 9:30 a.m.

APPEARANCES:

WILLIAM E. MULLIN, Esq. and
EDWIN VIELA, JR., Esq.
Appearing on behalf of Plaintiffs.

DONALD J. MUETING, Esq.,
ERIC MILLER, Esq., and
STEPHEN BEFORT, Esq.,
Appearing on behalf of Defendants.

[2] WHEREUPON, the following proceedings were had:

THE COURT: It seems to me I might just as well go with that Knight matter first because I don't think that will take us 15 minutes, and rather than have all those other lawyers wait, I think we can take care of that.

So, if you want to wait just a moment—what is your pleasure? Do you want to wait a few minutes?

MR. MINGO: We can come back.

THE COURT: Whatever is more convenient to you. Do you want us to take a break? I leave it up to you.

MR. MINGO: We will take a break.

THE COURT: We will let you know.

Two things come to my mind: First when I see Mr. Mullin I should tell you that last weekend I, among other things, read a book entitled the Sixth Word by Mr. Lebedoff (ph) as I am sure you have read. I have had Mr. Opperman in my court any number of times and somebody told me because of that I should read the Sixth Word and on the first page it was all about William Mullin.

MR. MULLIN: I want the Court to know that in the ten years that have elapsed since that book was written I have changed my ways. Anything you have read in that book would not now be applicable.

THE COURT: I'll let that pass. But, it was interesting, I had read the 21st Ballot previously. I like his [3] style of writing.

Secondly, about a month ago, or three weeks ago I had my able assistant Ms. Palmer prepare a list of cases '74 and earlier. I came on the bench in January of '75, so anything '74 and earlier are cases that I came to by way of inheritance. The rest of them I have to assume full responsibility for and I am delighted to report that yours was on that list and the list is down to about eight or ten now, maybe six. You people will soon have the distinction of having the oldest case on my calendar or thereabouts; which may or may not be considered a distinction, and I thought I haven't looked at your case for so long I kind of lost track of it, or what is going on to be sure, and I thought it might be helpful—I know it would be helpful to me at least if we could just get together for a few minutes and have you tell me where we are at and where we are going, and how we are going to get there.

As we all know it is now a three judge case and there is nothing I can do with it except to see how it is doing and report to my brethren as to what we might expect in the future. I see you have 50,000 pages of documents produced, among other things, and knowing my other two brethren on

the three judge panel, they are going to be overwhelmed when they see that number.

For the plaintiff who wants to tell me where we are at and where we are going or how we will get there and what we [4] should do to do something with the case.

You are from Washington, as I remember?

MR. VIEIRA: Maryland, sir.

THE COURT: All right.

MR. VIEIRA: The first thing I want to assure Your Honor of is we have no intention of asking Your Honor, or the other judges to read any 50,000 pages of documents. I have had the unfortunate pleasure of looking at most of those pages. Our intention is to, as much as possible, to distill that material, synthesize it, and get it in tabular and summary form and present it in that fashion; in what we hope will be a convenience for both the Court and clerks to deal with.

Now, as this summary prepared by Mr. Miller recounts, we have been, since early in 1977, conducting depositions of various individuals who fulfilled leadership rolls in the NEA, MEA, MCCFA; their political action committees, and so on. We have conducted 17 depositions, we have two that are scheduled for next week.

The defendants have also produced, as this document recounts, quite a bit of material that we are now analysing and putting into form. We think we are getting just about to the end of what we consider is necessary to the presentation of the case and we hope that as soon as that is finished we are going to be able to prepare more or less straight forward summary judgment motions, no hearing, calling of witnesses, and [5] so forth being required; that all of the constitutional issues at least can be decided on the basis of documents that have been produced and introduced as exhibits in depositions, and on the basis of depositions

and affidavits. So there won't be any necessity for any prolonged proceedings.

It is no secret to anyone connected with the case that the plaintiffs' position here is that the NEA and various other organizations constitute something very much akin to a political action organization or political party. That is what we are trying to prove. There is no dispute about that. There has never been any dispute as to our contention. We think now that we have reached the crux of the case because the two witnesses that are to be called next week, Roslyn Baker (ph) and Stanley McFarland (ph), are two of the leading figures in the NEA's Governmental Relations Department; and we believe that they have had, during 1976 and perhaps earlier, significant and substantial contacts with particular politicians, candidates for elective office, and in particular Mr. Carter and Mondale, they were very much involved, along with others, with the NEA and affiliate organizations in that 1976 Presidential Campaign.

Besides those two individuals we have subpoenaed five others, four of whom are on Mr. Carter's staff in the White House—Hamilton Jordan being one figure I am sure you are familiar with by name, and at the present time we are having discussions with their counsel in Washington for the production [6] of affidavits or documents from them so we won't have to bother with any depositions.

Our plan is a very simple one, I hope it is a straight forward one, as soon as we are finished with Baker and McFarland next week we have at present a list of four or six people, at the most six, that we would want to call to finish up the depositions.

As Mr. Miller has suggested here on this summary, there are some documents, six requests for the production of documents that the NEA and MEA have yet to produce. We think we will have another couple of pages of document requests, especially after we have heard from McFarland and Baker.

After that, as far as we are concerned, we think we will have adduced all the evidence that we believe is necessary to prove the contentions that we have made.

THE COURT: You are intending to make a motion for summary judgment to be attached with an outline or a synthesis, as you call it, of the documentary evidence whether it be by way of deposition or documents that have been produced up to this point?

MR. VIEIRA: What we hope to do is take the relevant portion of all of the documents, all the documents have been introduced at one state or another, or they will be by the time summary judgment comes up, we will take the relevant pages out of those documents and prepare a large appendix to our [7] summary judgment brief, cross-referenced completely to the brief and to the depositions, and so forth and so on, and that would be what would be presented directly to the Court.

THE COURT: At one time there was the hope that we could prepare—you could prepare a stipulation of undisputed facts. Now I know you put some energy on that but I have the feeling that maybe it was not productive. What is your—

MR. VIEIRA: Well, it was and it wasn't, Your Honor. We presented the defendants with 300 or so requests to admit certain facts and they admitted some and they denied others and we had conferences with them over the various types of language that we wanted or they wanted. Sometimes we compromised and sometimes they did; and sometimes neither of us did. The short answer was the final request we made, which was that the defendant organizations, the NEA, MEA, MCCFA, and so forth, are substantially engaged in certain types of political activity was denied and that is the ultimate conclusion of fact that we are trying to prove.

THE COURT: Were there any facts, or was there any stipulation of undisputed facts of any kind that either has been or will be produced so that we have some framework within which to operate?

MR. VIEIRA: Yes, sir. I am not sure of the number, maybe Mr. Miller can suggest it, but there is a goodly number of the requests to admit that were admitted and I don't [8] think we are going to have any problem with respect to Mr. Mueting's defendants, that is the State officials, as to how the MCCFA was certified, how the collective bargaining agreement was negotiated, what the MCCFA has been doing with respect to the Community College Board—

THE COURT: I am talking about a document that will be described as a stipulation of undisputed facts rather than having to go back through the requests for production, or the requests for admissions, and make—go back and dig into this file. Is there going to be a document which will have a stipulation of undisputed facts, at least to the extent that there are certain facts about which there is no dispute? I thought that you had put your efforts and energy towards trying to produce that; and I also thought it wasn't successful, but it seems to me there must be some things which would give us as judges a framework to start with and say, "these are the undisputed facts". To be sure there will be other disputed facts, but has there been any effort to generate such a document?

MR. VIEIRA: No. Aside from the work we did on the request to admit, we haven't sat down—

MR. MULLIN: I should add Mr. Mueting and I have been working on a document between the plaintiffs and the defendant State officials that would summarize the mechanics of the operation of the statute that is under challenge; and there are really no disagreements we know of about language. We have been [9] discussing this document because of the pendant—the fact that other discovery has been

pending we haven't finalized it, but with respect to those matters and with respect to—perhaps with respect to other mechanical matters we can work out with the defendants, such documents are possible here, Your Honor.

THE COURT: It seems to me there must be some areas about which there is no substantial dispute on the facts. To be sure there may be others about which there is substantial dispute, but it seems to me that the attorneys—I will hear from all of you—that the attorneys ought to be able to prepare a statement of uncontroverted facts—not agreeing they are all relevant or they all have bearing on the issues, but at least to give us a starting point from which to work. I think that that would be helpful to myself, at least, and helpful to the other judges too.

What is your timeframe, how much time are we talking about from this point on?

MR. VIEIRA: The thing that has actually taken the time in these depositions from '77 to today has not been the time that has been used in the depositions. Like I say, we have 17 people so far. Most of the depositions have been one day or two days, some half a day, so it is about 35 days total. What has been the actual time lag has really been a scheduling matter. We have bent over backwards not to try to call in Mr. Miller's people when they have had some other commitments and [10] so on and so forth.

I think with respect to the ones we are talking about after Baker and McFarland we ought to be able to get it done, if we really push it, by early December—mid-December. After that it is a matter of our preparing a record and drawing up our motion. We have been doing that as we have been going along.

THE COURT: From your standpoint we will complete discovery by the 31st of December?

MR. VIEIRA: I think we can do that.

THE COURT: And, how much time would you need to prepare the motions and your supporting material and background data?

MR. VIEIRA: I think if we had at the outside 45 to 60 days we can put the whole thing together. We have been working at it as we go along but as Mr. Miller suggested there is a lot of material here, you are talking about an organization that has 1.8 million members.

THE COURT: All right. Now who should I hear from first, the State or the organizational defendants? Do you represent all of the employee organizations?

MR. MILLER: We do, Your Honor.

To try to avoid a depressing note, when Edwin recites that there are a million eight NEA members they certainly are not all involved, although there has been times I have wondered [11] in light of the scope of discovery.

The summary I have prepared, Judge, I won't go over. You have had a chance to previously review it, there has been a substantial amount of discovery in this case.

THE COURT: This summarizes the discovery that has taken place to date?

MR. MILLER: It does.

THE COURT: All right.

MR. MILLER: The brunt of it has taken place in a little over two years now. We have been doing nothing but discovery. As the summary indicates we have answered over 350 interrogatories. We have produced over—

THE COURT: Excuse me for interrupting, you will be happy and thrilled to know at our Judges meeting yesterday we adopted the Minnesota practice, as in Chicago, or the Northern District of Illinois, of limiting written interrogatories to fifty. That works in State court pretty well, doesn't it?

MR. MILLER: It does, Your Honor, on a certain number of cases.

MR. MULLIN: It's too late.

MR. MILLER: I could add it is too little, too late. We have answered more than 350 to date. Our estimate of 50,000 pages is a conservative one. There are some more documents which we have consented to produce and we are going to produce very shortly, so the number is going to be edged upward.

[12] We have had a substantial number of depositions, and by just the titles of the people, Judge, you can see that all of the principles and some folks who would probably rank in the next echelon in terms of officers and professional staff of all of our clients have been deposed; along with at least one of the State defendant officers.

We have responded to 381 requests for admission. Let me stop on that point: those admissions or requests, Judge, consisted of this book right here and then another stack about another ten to twelve inches in height of documents. We have admitted to the authenticity of every document that has been submitted to us that has been produced in the course of discovery. I won't show you the responses we put in, but in answer to your inquiry we have admitted to a substantial number of fundamental facts in this case.

We had suggested a long time ago, as I recall a year ago this last summer, that we try our hand jointly at a stipulation of facts. We have had some encouragement from Your Honor on that point. Now we started out in that vein but it ended up with the plaintiff submitting requests for admissions. We had difficulty with some of those requests and we have either denied them or some of them we have admitted in a limited fashion.

If we were to take our responses to those requests for admissions we would come up with a fairly fundamental

framework in terms of admitted facts. I do not know how much beyond [13] that the plaintiffs intend to persist on their characterization of the facts. I am at a loss, therefore, to frankly report to you where I think we are going to end up in being able to completely stipulate and agree to the facts.

I will be candid with you in light of what I perceive to be some of the purposes or goals of the lawsuit. I don't think we are going to be able to completely agree. I think we are going to be in conflict on certain facts and we may very well have to return to the Court and I think we are going to have to, to seek some direction from you as to how we are going to handle that, whether it is going to be handled in affidavit form or whether we are going to have to have perhaps some limited live testimony.

In terms of what I perceive to be the first things first, Edwin has given us a schedule as to when he thinks he can complete his discovery and that is by year end. In my view the discovery should terminate upon the completion of those two depositions that he has referenced next week which are to be taken in Washington, D.C., all next week; and upon our producing the documents that remain.

I don't want to take the Court's time any more than to tell you the remaining documents to be produced consist of correspondence out of the Central Administrative Offices of the NEA; consisting of a fair amount of material. All of that material has already been produced on behalf of the other employee organizations. [14] I find it very difficult to understand the necessity for up to six or more depositions, assuming that they are of my clients, I find it very difficult to understand what additional documents are going to be requested, as recited by Mr. Vieira, after the two depositions are taken next week.

I will be very candid with you, we have been very open in terms of responding to this discovery. We have not come to Your Honor in terms of seeking protective orders and

the like; we have gone, I believe, more than—to use a very poor pun—our fair share in responding to this discovery. I think it should terminate and, very frankly, if we are going to receive some additional discovery requests I will place everyone on notice that we may have to return to the Court in order to limit that discovery. We have had a lot of discovery, it has been expensive, and the 50,000 pages that I mentioned, as I say, one, is conservative; those pages have been plucked out of many more times than 50,000 pages to arrive at those. My office has spent a lot of time in Washington, D.C., looking through records there as well as here in Minnesota. We are not interested in going any further.

I would, I guess, urge the Court to consider cutting off discovery or, at a minimum, placing a date for that discovery which the plaintiffs want to propose to be submitted so that we can immediately assess it and if we have to, return to Court.

[15] We want to get the case underway in terms of first completing discovery and get it on for a motion. It has been pending four years this December.

THE COURT: All right. Who is going to tell me about the State's position?

MR. MUETING: Your Honor, Don Mueting from the Attorney General's Office. As Mr. Mullin indicated we have been working on a proposed stipulation of facts. I really can foresee no difficulty in arriving at a stipulation of facts to indicate to the Court the workings of the Public Employment Labor Relations Act, with regard to the relationship between the State defendants and the Minnesota Community College Faculty Association.

We have been waiting in the bullpen, so to speak, during this entire period. We haven't been intimately involved in the discovery, we have been monitoring it. I really can foresee no problems in arriving at a stipulation. We have dis-

cussed it in some detail and there really aren't any factual disputes with regard to the application of the Act in this particular instance.

We also will, I might add, talking about a second stipulation, in which a number of parties will be added to the lawsuit. Since it was filed in 1974 we have had some changes on the Board, Community State Board for Community Colleges, and we have had changes with regard to presidencies of colleges involved. [16] So, that will also be taken care of by way of stipulation.

Other than that, Your Honor, we are prepared to go to trial whenever the other parties are.

THE COURT: When you say trial, what do you envision a trial—what form do you envision it to take from your point of view?

MR. MUETING: From our point of view I think we can handle it by way of stipulation on all facts. I don't think there is anything in dispute and summary judgment would be entirely appropriate as far as we are concerned.

THE COURT: As far as the State defendants are concerned, your discovery is completed?

MR. MUETING: I believe we have supplied the plaintiffs with everything they have asked for.

THE COURT: I am talking about your discovery.

MR. MUETING: Ours is completed.

THE COURT: So the State discovery is completed in the sense that you don't have any more to do?

MR. MUETING: That is right.

THE COURT: Now do you anticipate making a motion for summary judgment on behalf of the State defendants so that the matter would be submitted to us on motion for summary judgment by all parties or will you just—how will you handle it?

MR. MUETING: We haven't really decided how we are going to handle it. We were waiting actually to find out [17] what is going to happen between the plaintiffs and the employee defendants; to see how they are going to resolve their differences.

We will be prepared, if that seems appropriate, to submit this on motion for summary judgment, but we haven't made that decision at this time yet, Your Honor.

THE COURT: How about the discovery—I think that is all for your part, Mr. Mueting—How about the discovery for the organizational defendants that they want to initiate? Does that complete it?

MR. MILLER: Yes. We have taken one deposition as reported in that summary. We do have some outstanding interrogatories to the plaintiffs which have not been answered; and depending on the road before us on stipulating, we may have some difficulties in that we served interrogatories—those which have been answered we were essentially told in response to contention interrogatories, we just went down their complaint and asked them for the facts underlying various allegations such as misrepresentation by some of my clients concerning what the Fair Share fee included. The response that we were uniformly given was we are still in the course of discovery and we will tell you in our trial brief. Well, that is not completely satisfactory from our point of view. If we can work out the stipulation of facts so that we understand which facts the plaintiffs in fact are relying upon in their complaint, we won't [18] have much trouble. But I do want to alert the Court that there are some—what I perceive to be potential, outstanding, problems in terms of arriving at an agreement on these facts.

A brief review of the requests for admissions I think will probably give Your Honor the best idea of the differences between the plaintiffs and my clients.

THE COURT: I am not suggesting that I am in a posture, nor do I feel the case indicates that I can expect that you would stipulate to all facts. Obviously there are going to be some differences of opinion as to what these depositions show. But, at the same time, there has to be a large area of facts about which there is no dispute and rather than for us three judges to sit down and browse through 18 depositions, or whatever number there are, it seems to me that the orderly fashion to do it is to have the attorneys prepare a stipulation of facts to the extent that they can. There are undisputed facts.

MR. MILLER: There is no dispute on that Judge. We have tried to do that, and we have done it in part through those requests for admissions.

THE COURT: All right. Now are you going to be making a motion for summary judgment or are you going to rely on letting the—suppose that the plaintiff were to make a motion for summary judgment and we were to deny that motion. We still have a lawsuit pending. Where are we at then?

MR. MILLER: Your Honor, I anticipate that assuming [19] we reach an understanding first on the facts that we can agree on, and we have an idea of what we cannot agree on, that all of us, all three corners of the lawsuit, I would anticipate would be before the Court on cross-summary judgment.

THE COURT: So you anticipate making such a motion too?

MR. MILLER: Yes, sir.

THE COURT: Even though you say there is a possibility that you would have to—you would want to present some live testimony?

MR. MILLER: That may be a possibility and if we cannot work out a mechanism for resolving that conflict, then we may have to go to that; or by affidavit.

THE COURT: Have I heard everybody now? Have you got any more you want to add in light of what these people have suggested?

MR. MULLIN: I think it might be helpful if I comment a little bit on the attempts to develop a stipulation of facts that have taken place so far.

We had discussions with the attorneys for the defendant labor organizations and it was agreed on both sides that the plaintiff should initiate the procedure and that—and get the ball rolling by presenting them with something in writing. And, as you have already been told we decided to do that in the form of requests for admissions without the formality and the [20] requirement of response would be helpful in moving things along. So, we did prepare and serve on defendants 300 plus requests for admissions. Each one of those requests contained with it an interrogatory. The interrogatory requested that the defendant, if they denied the request, that they state what it was about the request that required the denial.

The responses that we received, as you have already been advised did move things along substantially in that there were substantial admissions as to the authenticity of documents. We are not going to have any problems that I know of with respect to the fact that a document is what it purports to be.

With respect to any attempt on our part in the request for admissions to describe, characterize, summarize, or generalize with respect to what the defendant labor organizations do, and what they are, we had a flat denial and the interrogatories were not answered because they were objected to uniformly.

So, as Mr. Vieira said we had extensive meetings in which we satisfied ourselves that the problems with these denials had to do with generalizations, descriptions, characterizations, and attempts to summarize what the defendant labor

organizations do and what they are; which is at the heart of our case.

So, at the conclusion of these discussions we said [21] we feel we have—both sides agree we have gone as far as we could with our attempts to present this. So, we then said, “well, you try it”. If you think our characterizations are loaded or unfair, or so on, you try a neutral characterization. We were then told that—by the defendant labor organizations—that that is not our job, it is your job and we are not going to do it. So, we got no feedback from them as to how they felt what they do and are could be summarized and characterized. We then said if you are not going to do that, that means that we are going to have to establish what these payments do and are. I think I used the words that that is going to require the writing the history of World War II; and we were told sobeit, that is too bad, if that is the way it is going to be, fine.

That is the context of it, of the problem that the plaintiffs have been working on in getting the discovery that they have taken, taking the depositions and the like.

The only thing I can say is that in working on that problem from our side, we have fought long and hard about how to summarize—perhaps not in an agreed summary, but in a summary that we can present to the Court, all the documentation that we have gathered so that the limit that the Judges will be required to read will be as little as possible. We recognize that that is a very—next to winning the case, that is the most important thing that we have on our minds right now. We are going to do everything we can to accomplish that. We do not [22] anticipate presenting any live testimony. I want to make that clear right now. I don’t know what other parties have in mind when they say they might require—might do that. We are not going to do that.

THE COURT: I can tell all of you that there is an extreme reluctance on the part of all of us, I guess, to start taking live testimony in a three judge court case.

MR. MULLIN: We understand that.

THE COURT: You all understand that?

MR. MULLIN: And we are, from the beginning, we have been aware of that reluctance and we have never planned to do that.

So, what you are going to get from us is going to be fairly large in terms of the number of documents that back up our summaries and characterizations, and so on; but we do not anticipate that every piece of paper that we present to the Court to summarize our characterizations and generalizations will have to be read.

I would imagine that only with respect to the ones that the defendant labor organizations really hone in on and say that is really not true, or we really didn't have the kind of involvement that you are saying we had and for example in the 1976 Presidential election it may be necessary for some reading of documents to satisfy the Judges as to who is right.

Anyway, I just want you to know we are aware of [23] the Court's concerns and we are working as hard as we can to meet them.

THE COURT: Well, I am going to do this: There is no way I can judge the appropriateness or inappropriateness of the four or five additional depositions to which you make reference to, Mr. Vieira, but number one, I will report to the other judges the summary that you have given to me; and just in a brief way your observations today.

I will issue an order which does two things, it closes discovery in the case on the 31st of December—so if you want to take any additional depositions or whatever else you want to do by way of your discovery, it will all be completed by December 31st. Now that may also involve your producing documents or answering outstanding interrogatories of the defendants, and if you are not satisfied with

the answers that you get in that connection, then the only thing I can suggest is that you will have to bring on a motion to compel additional answers. You have done a lot of work together, I know, and I encourage you to keep doing that.

MR. MULLIN: Your Honor, with respect to that, Eric is correct in saying that we have declined to respond to some of these interrogatories that have asked the plaintiffs what it is we do and/or are that you object to; what it is about us that makes you complain about having us as your exclusive representative and being required to pay money to us.

[24] It is true and I should advise the Court that we probably will not be able to amend those interrogatories until we have completed discovery, so—

THE COURT: Well, you have got now two and a half months within which to do it.

MR. MULLIN: I understand. What I am saying is it probably will require some time and it should be a short time after December 31; discovery having been completed by December 31, for us to come back in and say—these are really contention interrogatories, they are not disclosing any facts that we have and are holding back, it is just a question of characterizing them, the evidence that has been developed in the case.

With respect to that I would ask the Court that there be—that we be permitted say another 45 days in which to answer those interrogatories, or 30 days.

THE COURT: I am going to suggest to you that I want a stipulation of undisputed facts prepared and in to me by the 30th of January. Now if there are contention interrogatories that you need some additional time for, it seems to me you should be able to have those answered in the context of this time frame by mid-January. So, if you want

some additional time to answer those so-called contention interrogatories, if I give you to the 15th of January that ought to take care of it.

All right, December 31st discovery will be closed except as to so-called contention interrogatories. I encourage [25] you to do it before that, but if you can't, you will have until January 15 for those.

Simultaneously with that I want you to continue your efforts on this stipulation of undisputed facts. It seems to me that by the 30th of January, or do you want another week on that, it doesn't—well it does make some difference to me—does that give you enough time, that four week period in January?

MR. MILLER: We will sure try.

MR. MULLIN: We will take a crack at it.

THE COURT: Let's say January 30, 1979, and then what I will do is schedule another get together like this, even now, for the last week in January so we can get together and see how you are doing and if we are on track, and encourage you to be on track because I know how much work you have put on this thing—I can tell by the file that you have been busy—so we will schedule another pre-trial for late January or early February and then, at that time, we can decide how you are going to present the thing by way of your motions or cross-motions for summary judgment, or however.

It seems to me the way to do it is to have three motions for summary judgment, all right?

There are two things that are just impressions that I have about this: Number one is a case out of Detroit and number two is the fact that the Statute has been changed or modified. Now are you addressing the case to the Statute as it [26] now exists, I assume?

MR. VIEIRA: Yes.

THE COURT: Even in its modified form?

MR. VIEIRA: Yes.

THE COURT: All right. So it is a current Statute that we are going to be concerned with?

MR. VIEIRA: Yes.

MR. MILLER: That is my understanding, Your Honor. An earlier challenge to the Robinsdale case, which I think the Court is aware of, was addressed to the Fair Share Statute as it existed prior to its amendment in April of 1976—

THE COURT: Is that the case Judge MacLaughlin wrote?

MR. MILLER: That is the case Judge MacLaughlin wrote and it went to the U.S. Supreme Court and the U.S. Supreme Court denied to hear it on the basis it was moot because the statute had been amended since the State Supreme Court had decided the Robinsdale decision.

THE COURT: All right. Is that all? Thank you for today.

(Whereupon the proceedings came to a close)

[27] REPORTERS CERTIFICATE

I, LAWRENCE P. LINDBERG, do hereby certify that the foregoing is a true and accurate transcription of the stenographic notes taken by me in the above-entitled matter.

/s/ LAWRENCE P. LINDBERG
Lawrence P. Lindberg
Official Court Reporter

APPENDIX N

TRANSCRIPT OF HEARING OF 2 FEBRUARY 1979

THE UNIVERSITY OF CHICAGO
THE DIVISION OF THE PHYSICAL SCIENCES
THE DEPARTMENT OF CHEMISTRY
THE LABORATORY OF PHYSICAL CHEMISTRY

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THE LABORATORY OF PHYSICAL CHEMISTRY

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-74-Civil-659

LEON KNIGHT, *et al.*, Plaintiffs,

v.

MCCF, *et al.*, Defendants.

Motion in the above-entitled matter came on for hearing before the Honorable Donald D. Alsop, one of the Judges of the above Court, at St. Paul, Minnesota, on February 2, 1979.

APPEARANCES:

ERIC MILLER, Esq.
EDWIN VIEIRA, Esq.
JOHN FOGARTY, Esq.
Appearing for Plaintiffs

DONALD MUETING, Esq.
STEPHEN BEFORT, Esq.
KEITH GOODWIN, Esq.
DONALD SELZER, Esq.
Appearing on behalf of Defendants

[2] WHEREUPON, the following proceedings were had:

THE COURT: Good morning, counsel.

The people from the state, I guess you are not involved in this controversy?

MR. MUETING: No, we aren't.

THE COURT: All right. The record may show that this was designed originally as a pretrial to finalize the procedures in connection with the presentation of this matter to a three-judge court, the convening of which was originally requested on motion by the plaintiffs, and that since then there has been filed a notice of plaintiffs' motion to rescind the Court's order of October 13, 1978, and for an order

commanding the production of certain files maintained by or depositions of certain staff personnel; the payment of certain costs and fees by the defendant NEA, MEA, Minnesota Community College Faculty Association, and IMPACE; and there has also been filed a motion of the defendants, so-called educational defendants, organization defendants, for an order under Rule 37 reprimanding and censuring Edwin Vieira, Thomas Logie, Rex Reed, John Fogarty, and Reed Larson, for ethical misconduct in violation of disciplinary rules, Code of Professional Responsibility and secondly, suppressing certain discovery tainted by the misconduct of the above-mentioned persons including the deposition of Jeffrey Saunders, the entire deposition of Frank Crumbley, parts of the [3] depositions of R. Dick Vander Woude and Kenneth Bresin, all of which concern matters investigated by private investigative firms of Associated Investigators.

I can tell you that I have gone back and reviewed my own correspondence in connection with this case and I have reviewed the memorandum that I submitted to Judges Heaney and Larson following our October 13 session and the order that ensued from that session.

There is no way to describe the reaction, I guess, to what has transpired since then in the sense that obviously the case has taken an entirely different turn based upon everything I have tried to accomplish over the last three years, at least, or however long it has been since the three-judge panel was empowered.

I do not propose to hear these motions. They are going to be heard by a three-judge panel. The other judges I think all have copies of this material and there is no reason why I should, as one member of a three-judge court, albeit the less senior members, concern myself independently of the other judges with this material, and I do not propose to do so.

I do have a couple of inquiries with reference to the plaintiffs' motion for the taking of additional depositions so that I am able to confer with my other brethren about the proceedings, if you will turn to page 5, please, of that motion [4] you will note that the plaintiff proposed to take the deposition of the first five designated persons under paragraph capital E. My records indicate that Mr. Mammenga's deposition has already been taken, consisting of 292 pages, Mr. McFarland's of 525 pages, Mr. Harman's of 484 pages; Mr. Bresin's of 157 pages; and Mr. Watts' of 444 pages.

Is that accurate, Mr. Vieira?

MR. VIEIRA: Yes, Your Honor.

THE COURT: Is that accurate as far as you know, Mr. Miller?

MR. MILLER: Yes, sir.

THE COURT: Under paragraph F where the plaintiff proposes to take the depositions of the persons designated one through six, namely Mr. Marty Palmer, Mr. Vaughn Baker, Mr. Howard Carroll, Mr. Kenneth Melley, Mr. Leon Felix, as far as I can ascertain the depositions of those five people have not been taken. Is that accurate, sir?

MR. VIEIRA: That is correct.

MR. MILLER: Yes, sir.

THE COURT: Mr. Vieira, how do you propose to present the factual material they propose to offer in this case to a three-judge panel? In what form?

MR. VIEIRA: You mean the factual material on the merits, Your Honor?

THE COURT: Yes, sir.

[5] MR. VIEIRA: I hope to present it in the form we have here, deposition testimony, exhibits that we prepared, vol-

umes from the deposition testimony, from various publications, other materials of the defendants, and summaries, of course, that we have prepared. We have had a great amount of this material summarized by experts and other individuals. We have gone through it——

THE COURT: When you say summaries in the form of oral testimony, in the form of written——

MR. VIEIRA: All in the form of—it is deposition testimony. We had an expert testify for two days with respect to the organizational structure of these defendants. We had another individual who analyzed their various publications, their press releases, and materials of that type and he has prepared summaries of the contents of those publications. All of this is available.

We don't expect—we hoped that we would not have to put any oral testimony on.

THE COURT: The Court ordered on October 16 that on or before January 30 the parties prepare, execute, and file with the Court a stipulation of undisputed facts. What has been done in that regard?

MR. VIEIRA: Your Honor, we went back and had a discussion with counsel for the defendants, resubmitted to them the request to admit that we had submitted earlier, said [6] take another look at these and see if you will deal with these again——

THE COURT: I am not talking about requests to admit. I am talking about stipulation of undisputed facts.

MR. VIEIRA: As stipulations, not in the sense of requests to admit, we didn't serve them with another set of requests to admit, we went back with that set and said can you deal with this as a matter of stipulation. I suggested two other suggested stipulations and on the day of the conference held in Mr. Miller's office they turned them down.

THE COURT: Mr. Miller, how do you propose to offer or submit the factual material to the three-judge panel?

MR. MILLER: You have instructed us on a number of occasions that you wanted this matter resolved by way of cross summary judgment, and we have taken extensive efforts to try to stipulate to facts which was the initial premise, rather than requests for admissions.

The plaintiffs were going to propose a stipulation of facts. Instead we had the requests for admissions and we have gone through that extensively and it is a part of the motion that was to be heard today.

We had hoped that we would be able to submit a stipulation of facts but the request for admissions themselves bely, in our judgment, very candidly, the ability of both sides to be able to completely stipulate to facts. Our answer to [7] the requests for admissions, as I reported to you in October, do substantially carry forward stipulations of fact in terms of the fundamental underpinnings of the nature of our clients, what they do. That is in the record. It is there.

I would like to indicate to the Court that, as I did in October, that failing a stipulation of fact we may have to have live testimony or, if a compromise could be arrived at in terms of submitting supplemental affidavits to an arrived-at stipulation of fact or using—and/or using the requests for admissions that we have responded to.

We didn't object to a single one of those. We did in fact deny a number of them. We did in fact admit to a great number of them.

I would like to very quickly comment on Mr. Vieira's comments about resubmitting the requests for admissions and proposing the stipulation of facts.

THE COURT: After the October 13 meeting?

MR. MILLER: Yes, sir. That meeting took place on December 15 in my office.

Mr. Vieira and Mr. Mullin asked Mr. Goodwin and myself if we would one, reconsider our request for admission responses. We indicated that we would. We indicated that we would look those over and we started to. He also gave us a draft of a stipulation of facts in regard to the National Education Association. We took a very quick look at it, it [8] was a fairly extensive document, it indicated to him just on the first couple of pages some concerns, but that we would in fact consider it.

What happened? On December 31 the plaintiffs filed a massive motion to reopen discovery, not carrying forward on the stipulation of facts—we are not worried about the February 2 pretrial conference to set the rules in effect for trying this case, we want to continue discovery.

I would suggest that we were never given an opportunity to respond to that, it was just open the doors again.

THE COURT: What is your view as to the presentation of the factual material by way of deposition and the other discovery material that is on file?

MR. MILLER: In terms of presenting it by way of deposition, and again this really—I don't want to delve into the merits of the motion before the Court, I realize the Court has indicated that you are not going to hear the motion today. The problem we are going to have is the manner in which the plaintiffs want to use the documents as well as the deposition transcripts. We have admitted to facts and as they have indicated, that is not enough. We should be compelled to admit to the significance, the interpretation, the results of certain facts. We have never had a problem in admitting to facts, Judge. We have admitted to the authenticity of documents, we have admitted to any number of [9] facts. It is the interpretation, the significance of these facts that is hanging us up.

THE COURT: Help me as to how you feel I get the facts before the three-judge panel?

MR. MILLER: Judge, if we can't do it——

THE COURT: You say you can't. Tell me how you propose to do it?

MR. MILLER: If we cannot do it by way of stipulation of facts I would propose that we are either going to have to have supplemental live testimony in addition to the facts that we clearly have agreed to, particularly in the requests for admissions and/or consider the affidavit route. Those were the two items that we briefly touched on in the October meeting, that failing a stipulation of facts what can we do besides having a full-blown trial.

THE COURT: I can tell you you are not going to have a full-blown trial, I can tell you that.

MR. MILLER: That is my understanding.

THE COURT: All of you dispossess yourselves of the idea that there is going to be testimony in this case because based upon my informal conversations with the other judges, I can tell you that is not going to happen.

MR. MILLER: We never contemplated it really was going to.

THE COURT: I know you haven't. But short of that [10] you are talking—this Court has worked with all of you for three years and I have reviewed my correspondence where I have literally begged you to get together and stipulate to facts and instead of that I get 20 volumes of affidavits that obviously are the results of a monumental effort on the part of somebody, that it seems to me could better have been spent in preparing a stipulation of undisputed facts rather than asking somebody to go through and read 26 volumes. But that is where we are at.

Your view is that what, it can be submitted by——

MR. MILLER: I think it can be, judge——

THE COURT: —by depositions?

MR. MILLER: I think it can. If, and it may take some guidance of the Court to sit both sides down so that we have a clear understanding of what a stipulation of fact consists of as opposed to trying to include the significance of those facts and entertaining and engaging in argument on that. That is what lawyering is about, for briefing and arguments to the Court as far as we are concerned, and that is the approach we have tried to take.

Facts, yes. We invite the Court to take a look at those requests for admission in terms of a lot of fundamental facts. When you compare that with a complaint a lot of those have been agreed to.

THE COURT: All right. Let's hear from the state. [11] You are not involved in this directly?

MR. MUETING: No, Your Honor. We, as late as last week, I discussed a proposed stipulation of facts with Mr. Mullin and he indicated that there was no more discovery sought of the state defendants, that he was preparing a stipulation of undisputed facts. We have agreed in the past that there does not appear to be any problem with that. He just indicated that because of the controversy between the plaintiffs and the nonstate defendants, that he is holding up his proposed stipulation of facts regarding the state's involvement.

THE COURT: You are telling me, Mr. Mullen agreed that he can enter into a stipulation of undisputed facts with the state on behalf of the plaintiffs?

MR. MUETING: With the state. That is my understanding, Mr. Vieira, I believe that is correct.

THE COURT: All right. Well, all I can tell you, counsel, is I intend to confer with the other two judges of this three-judge panel and decide what happens next.

Is there anything else you want to tell me for the benefit again of getting the case put together?

MR. VIEIRA: Well, Your Honor, I would like to make one comments, with all due respect, I take exception to your suggestion that plaintiffs have not put just as much work in this case into attempting to get requests for [12] admissions prepared or stipulations arrived at than we put into this material. In fact, since I prepared the request to admit I can speak definitively on that subject.

THE COURT: You are not going to speak on it today.

MR. VIEIRA: I am not going to speak on the merits. I did twice as much work as was done with respect to this motion and the results of having done that work, the answers received from the defendant organizations, are covered in this motion and they speak for themselves and they do not cast any aspersions on what the plaintiffs have done.

THE COURT: Counsel, I will advise you as to our next hearing date, after I have talked with Judges Heaney and Larson.

MR. MILLER: Thank you, Judge.

(Whereupon, the proceedings came to a close.)

[13] REPORTER'S CERTIFICATE

I do hereby certify that the foregoing is a true and accurate transcript of the stenographic taken by me in the above-mentioned portion of the above-entitled matter.

LAWRENCE P. LINDBERG
Official Court Reporter



APPENDIX O

**ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

Dated 20 June 1979

ATTENTION

ORDER BY THE UNITED STATES DEPARTMENT OF AGRICULTURE
FOR THE PURCHASE OF LAND

TO BE MADE BY

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-74 Civ. 659

LEON W. KNIGHT, *et al.*, *Plaintiffs*,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION,
et al., *Defendants*.

ORDER

Plaintiffs have filed a Motion for Dissolution or Stay of the Court's Order of April 4, 1979 and for Reconsideration and Hearing on the Plaintiffs' Motion to Rescind the Court's Order of October 13, 1978 (Docket Entry No. V-58). Plaintiffs have also filed a Motion for Dissolution or Stay of the Court's Order of April 4, 1979 and for Reconsideration and Hearing on Plaintiffs' Motion to Rescind the Court's Order of October 13, 1978 and of Plaintiffs' Motion to Reschedule Dates for Compliance with the Court's Order of April 4, 1979 (Docket Entry No. VI-8).

By its order of June 15, 1979, issued as a result of the cooperation of all parties, the court has now provided for a rescheduling of the dates originally set forth in the order of April 4, 1979.

Upon all files, records and proceedings herein,

It Is ORDERED That the plaintiffs' various motions to set down for hearing, to reconsider and to rescind the court's order of October 13, 1979 be and the same hereby are in all things denied.

IT IS FURTHER ORDERED That the plaintiffs' motion to stay the court's order of April 4, 1979 as now amended by the court's order of June 15, 1979 be and the same hereby is in all things denied.

DATED: June 20, 1979.

/s/ DONALD D. ALSOP
Donald D. Alsop
United States District Judge



AUG 18 1979

IN THE

Supreme Court of the United States

SHAW, RODAK, JR., CLERK

October Term 1979

No. — **79-75** —

LEON W. KNIGHT, ET AL.,

Petitioners,

vs.

THE HONORABLE GERALD W. HEANEY, UNITED STATES CIRCUIT JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND EARL R. LARSON AND DONALD D. ALSOP, UNITED STATES DISTRICT JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA,

Respondents.

**DEFENDANT LABOR ORGANIZATIONS'
BRIEF IN OPPOSITION TO THE MOTION
FOR LEAVE TO FILE PETITION FOR
EXTRAORDINARY WRIT DIRECTED TO THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MINNESOTA**

and

PETITION FOR EXTRAORDINARY WRIT

ERIC R. MILLER
KEITH E. GOODWIN
DONALD W. SELZER, JR.
MARK D. ANDERSON
OPPENHEIMER, WOLFF,
FOSTER, SHEPARD
AND DONNELLY

1700 First National

Bank Building

Saint Paul, MN 55101

Attorneys for Defendant

Labor Organizations

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IN THE
Supreme Court of the United States

October Term 1979

No. _____

LEON W. KNIGHT, ET AL.,

Petitioners,

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THE HONORABLE GERALD W. HEANEY, UNITED
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DEFENDANT LABOR ORGANIZATIONS'
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UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MINNESOTA
and
PETITION FOR EXTRAORDINARY WRIT

STATEMENT OF THE CASE

On December 19, 1974, twenty Minnesota Community College Faculty members, by and with the assistance of the National Right to Work Legal Defense Foundation, filed the present lawsuit challenging the constitutionality of public sector collective bargaining in Minnesota under the First, Fifth, Ninth, Tenth, Eleventh, Thirteenth and Fourteenth Amendments to the United States Constitution. Named as defendants were the Minnesota Community College Faculty Association ("MCCFA"), the Minnesota Education Association ("MEA"), the National Education Association ("NEA"), the Independent Minnesota Political Action Committee for Education ("IMPACE"), officers and employees of the aforementioned organizations (this group of defendants is referred to as the "defendant labor organizations"), and several public officials of the State of Minnesota. Plaintiffs requested the convention of a three-judge court pursuant to 28 U.S.C. §2281.

The initial stages of the lawsuit dealt with issues of abstention and whether it was appropriate to convene a three-judge court to consider plaintiffs' allegations. On May 17, 1976, the Court of Appeals for the Eighth Circuit ordered the convention of a three-judge court and the Honorable Gerald W. Heaney, Earl R. Larson and Donald D. Alsop were subsequently impaneled to constitute that Court.

In an effort to provide structure and guidance, the three-judge court, through Judge Alsop, periodically communicated with the parties to monitor the progress of the case. Consistent with this practice, the Court issued an order on September 25, 1978 scheduling a pretrial hearing for October 13, 1978, for the purpose of determining the current status of discovery and to schedule preparation for trial. The October 16, 1978

order closing discovery was the direct product of the October 13 hearing and the Court's satisfaction that such order was appropriate given the breadth of discovery completed and the explicit representations by plaintiffs' counsel that they should have no difficulty completing discovery by mid-December, 1978.

On December 30, 1978, plaintiffs moved for rescission of the District Court's October 13 discovery deadline and requested that sanctions be imposed on defendant labor organizations. The Court's surprise was understandable when, one day before the discovery deadline, plaintiffs served notice that they were charging defendants with a massive conspiracy to thwart their discovery rights and submitted for the Court's review a 266 page brief, with 10 volumes of supporting data, all of which weighed 34 pounds. It was as if the pretrial hearing of October 13, 1978, which was designed to and did in fact address discovery matters, never occurred.

It was with this background that Judge Alsop commented on the February 2, 1979, hearing to the following effect:

I can tell you that I have gone back and reviewed my own correspondence in connection with this case and I have reviewed the memorandum that I submitted to Judges Heaney and Larson following our October 13 session and the order that ensued from that session.

There is no way to describe the reaction, I guess, to what has transpired since then in the sense that obviously the case has taken an entirely different turn based upon everything I have tried to accomplish over the last three years. . . .

Petitioners' appendices, (hereinafter "Pet. A.") page 460.

I. PETITIONERS SHOULD ADDRESS THEIR PETITION FOR EXTRAORDINARY WRIT TO THE COURT OF APPEALS.

Petitioners have requested leave to petition this Court for a writ in the nature of mandamus to compel the three-judge District Court to reopen discovery. They have addressed their petition to this Court on the theory that it has exclusive jurisdiction to consider the petition. Petitioners' theory, however, is erroneous. Concurrent jurisdiction to consider this petition lies with the Court of Appeals for the Eighth Circuit. Thus, as set forth below, while any court properly considering this petition should deny it on its merits, this Court should direct plaintiffs to pursue their remedies, if any, in the Court of Appeals for the Eighth Circuit.

A. This Court and the Court of Appeals have concurrent jurisdiction to consider petitioners' request for extraordinary writ.

The power to issue extraordinary writs is a function of appellate jurisdiction. The All Writs Act, 28 U.S.C. §1651, provides:

- (a) The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

In the circumstances present here, the power to issue the writ requested by petitioners lies with all courts possessing appellate jurisdiction that could arguably be aided by issuing the writ. In other words, this petition could be addressed to any court possessing appellate jurisdiction.

In this instance the Court of Appeals possesses immediate appellate jurisdiction over the issues raised by petitioners; the Supreme Court possesses ultimate appellate jurisdiction.

Petitioners assert that under 28 U.S.C. §1253 (1970) this Court has *exclusive* appellate jurisdiction over the merits of the constitutional claims for injunctive relief and that therefore it also has *exclusive* jurisdiction under the All Writs Act, 28 U.S.C. §1651 (1970), to hear petitions for extraordinary writs. However, under 28 U.S.C. §1253, direct appeal lies to this Court only in narrowly prescribed circumstances, and in all other cases lies to the Court of Appeals. Section 1253 provides:

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

In accordance with the "overriding policy . . . of minimizing [this Court's] mandatory docket," this statute has been construed narrowly. *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974); *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975). This narrow construction has taken two forms. First, the right of direct appeal to this Court is restricted to those orders granting or denying injunctive relief. *Rockefeller v. Catholic Medical Center*, 397 U.S. 820 (1970); *Goldstein v. Cox*, 396 U.S. 471 (1970). Second, a direct appeal to this Court lies "only where such order rests upon a resolution of the merits of the constitutional claim presented below." *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) (emphasis

added).¹ These limitations on the right of direct appeal to this Court can be rephrased as: a direct appeal is appropriate only where the ruling below involved the granting or denial of an injunction on the constitutional questions which formed the basis for the convention of the three-judge District Court. In all other circumstances, direct appeal lies only to the Court of Appeals.

The denial of the motion to reopen discovery involves neither a grant or denial of injunctive relief nor a decision on the underlying constitutional question. Direct appellate jurisdiction, therefore, lies only with the Court of Appeals for the Eighth Circuit. The Ninth Circuit Court of Appeals reached this conclusion when it assumed jurisdiction over a petition for a writ of mandamus to vacate a three-judge District Court's order compelling discovery. *Breed v. United States District Court for the Northern District of California*, 542 F.2d 1114 (9th Cir. 1976). That Court concluded that *MTM* means "that [the Circuit Court] has jurisdiction over appeals from appealable orders of three-judge district courts that do not resolve the merits of the constitutional claim presented." This petition is indistinguishable from that involved in *Breed*.

¹ On this basis direct appeal was held to lie only to the Circuit Court in the following cases: *MTM, Inc. v. Baxley*, 420 U.S. 799 (1975) (abstention based on *Younger v. Harris*, 401 U.S. 37 (1970)); *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90 (1974) (dismissal based on lack of standing); *McCarthy v. Briscoe*, 429 U.S. 1316 (1976) (Powell, J., acting as Circuit Judge) (denial of injunction on grounds of laches); *United States v. Louisiana*, 543 F.2d 1125 (5th Cir. 1976) (refusal to permit intervention); *Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977) (an injunction was awarded, but a refusal to award damages based on Eleventh Amendment grounds was appealed); *Sea Ranch Assn. v. California Coastal Zone Conservation Commissions*, 537 F.2d 1058 (9th Cir. 1976), and *Roe v. Rampton*, 535 F.2d 1219 (10th Cir. 1976) (dismissals based on abstention); *Valentino v. Howlett*, 528 F.2d 975 (7th Cir. 1976) (dismissal based on mootness).

While this Court has no direct appellate jurisdiction over the questions raised by petitioners, by virtue of its ultimate power of review, it retains jurisdiction to issue extraordinary writs. *Ex parte Republic of Peru*, 318 U.S. 578, 584-85 (1943); *Ex parte United States*, 287 U.S. 241, 246 (1932). However, since the Court of Appeals possesses direct appellate jurisdiction, that Court also possesses jurisdiction to consider petitions for such writs.² See *Breed*, *supra*.

B. Petitioners have raised no issue appropriate for direct review by the Court.

Although this Court has the power to issue the writ requested by petitioners, the issuance of such a writ "is not a matter of right but of sound discretion sparingly exercised." U.S. Sup. Ct. Rule 30. Where the Court of Appeals possesses concurrent jurisdiction to issue such writs, this Court's discretion is rarely exercised.

² Petitioners rely on several cases (Petition at 4 n.5) to support their contention that this Court "has exclusive jurisdiction . . . to hear their Petition. . . ." The cited cases are inapposite.

The bulk of these cases, e.g., *Tidewater Oil Co. v. United States*, 409 U.S. 151 (1972); *United States Alkali Export Assn., Inc. v. United States*, 325 U.S. 196 (1945), involved anti-trust cases for which appellate jurisdiction was governed by §2 of the Expediting Act, 15 U.S.C. §29, which then provided: "An appeal from the final judgment of the district court will lie only to the Supreme Court." (The statute has since been amended significantly, Pub. L. 93-528, §4, 88 Stat. 1708, December 12, 1974.) This provision was construed so as to limit appellate jurisdiction in these cases *only* to the Supreme Court and *only* from final judgments. *Tidewater Oil Co.*, 409 U.S. at 164-65, 173-74. Consequently, any application for a common law writ based on the aid of appellate jurisdiction necessarily had to be to this Court. *Alkali Export*, 325 U.S. at 202.

Petitioners' application, on the other hand springs from a case for which appellate jurisdiction is based on 28 U.S.C. §1253. In such cases, this Court's appellate jurisdiction is not exclusive. The Court of Appeals possess appellate jurisdiction in a variety of circumstances. *MTM, Inc. v. Baxley*, 420 U.S. 799 (1975). Petitioners' reliance on Expediting Act cases, therefore, is misplaced.

"[A]pplication for the writ must ordinarily be made to the intermediate appellate court, and made to this Court as the court of ultimate review only in . . . exceptional cases." *Ex parte United States*, 287 U.S. at 248, quoted in *Ex parte Republic of Peru*, 318 U.S. at 585.

Such exceptional cases involve questions "of public importance . . . or [questions] of such a nature that it is peculiarly appropriate that such action by this Court should be taken." *Id.*

Petitioners' claim that discovery in this case should be reopened fails to meet this standard. This case involves a settled question of judicial administration as set forth in section II below and not an undecided question of public importance. By comparison, in the past, questions of sufficient public importance have been held to include judicial interference in orderly criminal processes and court action affecting foreign relations. *Ex parte United States, supra*, (District Court refused to issue arrest warrant after presentment of grand jury indictment "fair on its face"); *Ex parte Republic of Peru, supra*, (District Court continued to exercise *in rem* jurisdiction over Peruvian steamship after State Department had recognized a claim of immunity). Petitioners raise no issue of similar importance. Nor do petitioners raise issues peculiarly appropriate for direct review by this Court. Circuit Courts have previously considered similar petitions, even in cases involving three-judge District Courts. *See Breed, supra*. Nothing indicates that they are incapable of doing so here.³

³ Petitioners have failed to comply with Supreme Court Rule 31 in that they have not "set forth particularity" why the relief sought is not available in any other court. Aside from a cursory and inaccurate assertion that this Court has exclusive appellate jurisdiction and, therefore, exclusive jurisdiction to consider the petition, (see Petition at 3-4) petitioners have not explained why the requested relief is not available from the Circuit Court.

II. PETITIONERS HAVE FAILED TO MEET THEIR BURDEN OF DEMONSTRATING A USURPATION OF POWER BY THE THREE-JUDGE DISTRICT COURT.

A. Plaintiffs must demonstrate a usurpation of power by the District Court.

This Court has recently restated the standards for considering a petition for a writ of mandamus. In *Kerr v. United States District Court*, 426 U.S. 394 (1976), petitioners were dissatisfied with a discovery ruling by the district court and petitioned the Court of Appeals for the Ninth Circuit for a writ of mandamus. The Court of Appeals refused to issue the writ and petitioners sought review in this Court, which affirmed the Court of Appeals' denial.

The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. [cites omitted]

. . . .

And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of "jurisdiction," [cites omitted] the fact still remains that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Ibid.*

Our treatment of mandamus within the federal court system as an extraordinary remedy is not without good reason. As we have recognized before, mandamus actions such as the one involved in the instant case "have the unfortunate consequence of making the [district court] judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him" in the underlying case. [cites omitted] More

importantly, particularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule "appellate review should be postponed . . . until after final judgment has been rendered by the trial court." [cites omitted] A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress.

426 U.S. at 402-403, footnote omitted.

Accord: *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978).

B. A United States District Court has broad discretionary powers to manage its docket.

Plaintiffs' argument that a district court usurps power when it establishes discovery deadlines is premised on a fundamental misapprehension of the inherent power of the federal bench to control its docket and is contrary to the collective authority of the Federal Rules of Civil Procedure, the Manual for Complex Litigation and judicial precedent.⁴

The Federal Rules of Civil Procedure are to be "construed to secure the just, speedy and inexpensive determination of

⁴ The appropriateness of the Discovery Order entered by the three-judge Court in this case, given the length of the discovery period, the breadth of discovery obtained and the representations by plaintiffs' counsel on October 13, 1978 regarding the amount of time necessary to complete discovery, will be discussed *infra*. This section of the brief is limited to an analysis of the District Court's power and discretion to enter an order establishing discovery deadlines.

every action." Federal Rules of Civil Procedure, Rule 1. Rule 16 of the same rules provides district courts with the authority to hold pretrial hearings and to consider and rule on such "matters as may aid in the disposition of the action." Furthermore, Rule 83 allows district courts to promulgate rules of practice in their respective districts which are not inconsistent with the federal rules. Pursuant to that authority the judges for the District of Minnesota have promulgated local Rule 3(a) (Rule 4 prior to January 1, 1979) which provides that a judge in Minnesota may "prescribe such pretrial and discovery procedure as he may determine appropriate." A. 120.

In addition to the authority in the Federal Rules of Civil Procedure, as set forth above, the Manual for Complex Litigation strongly encourages federal judges to exercise judicial control over complex litigation, stating:

The trial judge has the undoubted power and inescapable duty to control the processing of a case from the time it is filed. In the complex case, the judge must assume an active role in managing all steps of the proceedings. . . .

A crucial step in the first phase of judicial management of the complex case is the prompt entry of an order initiating a pretrial conference to provide early and efficient schedule of pretrial discovery and preparation. Manual for Complex Litigation (1977) §1.10, page 15.

At the second pretrial conference, a schedule for filing all remaining discovery requests should have been established.

Manual for Complex Litigation (1977) §3.10, page 120.

Courts have long recognized the power to manage their dockets. In *Landis v. North American Company*, 299 U.S. 248

(1936), this court acknowledged "the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." 295 U.S. at 254-255.

In *Greyhound Lines, Inc. v. Miller*, 402 F.2d 114 (8th Cir. 1968), the Court of Appeals for the Eighth Circuit stated:

CUTTING OFF DISCOVERY

Defendant asserts the court erred in cutting off discovery rights; contends the court's action was contrary to the spirit and intent of our broad and liberal discovery rules and that such action was in excess of the court's powers. No cases are cited for this contention.

Initially, we think the matter falls within the discretionary powers of the District Court and, absent abuse or prejudice, it will not be disturbed by us. Title 28 U.S.C. §2071 grants the Supreme Court and all other courts established by Congress the power to prescribe rules for the conduct of their business consistent with congressional enactments and the rules of practice and procedure prescribed by the Supreme Court.

The court had inherent power to control the time table on discovery within reasonable limits. . . .

402 F.2d at 144.⁵

⁵ See also *Riverside Memorial, etc. v. Sonnenblick-Goldman*, 80 F.R.D. 433, 435, (E.D. Pa. 1978) (a trial judge is charged with the duty of moving his cases expeditiously and to do so, he must have the power to order time limitations); *Transamerica Computer Company, Inc. v. IBM*, 573 F.2d 646, 652-653, (9th Cir. 1978) (under Fed.R.Civ.P. 26(c)(2) the district court presiding over discovery procedures can dictate "the specific terms and conditions upon which discovery may be had. This rule merely clarifies the formal rule . . . [and] . . . certainly empowers the court, inter alia, to set deadlines for completion of discovery").

Similarly, *In Re AIR CRASH DISASTER AT FLORIDA EVERGLADES ON DECEMBER 29, 1972*, 549 F.2d 1006 (5th Cir. 1977), the Fifth Circuit Court of Appeals stated:

Managerial power is not merely desirable. It is a critical necessity. The demands upon the federal courts are at least heavy, at most crushing. Actions are ever more complex, the number of cases greater, and in the federal system we are legislatively given new areas of responsibility almost annually. Our trial and appellate judges are under growing pressure from the public, the bar, the Congress and from this court to work more expeditiously. In most instances these pressures reflect fully justified societal demands. But court resources and capacities are finite. We face the hard necessity that, within proper limits, judges must be permitted to bring management power to bear upon massive and complex litigation to prevent it from monopolizing the services of the court to the exclusion of other litigants. These considerations are at the heart of steps to create procedures for handling complex litigation.

549 F.2d at 1012.

- C. The three-judge District Court did not usurp power when it closed and subsequently declined to reopen discovery

The District Court was well within its discretion when it issued its Order of October 16, 1978 establishing a discovery cut-off date of December 31, 1978. Plaintiffs' attempts to characterize the court's action as a *sua sponte* imposition are misleading. The transcript of the October 13, 1978 hearing, A.

1, demonstrates that the date for discovery completion was arrived at by virtual stipulation of plaintiffs' counsel. During a general report to the Court regarding the status of the case, plaintiffs' counsel affirmatively represented that discovery was nearly completed and that the remaining portion could be finished by December.

[By plaintiffs' counsel, Mr. Vieira] Now as this summary prepared by Mr. Miller, recounts, we have been, since early in 1977, conducting depositions of various individuals who fulfilled the leadership roles in the NEA, MEA and MCCFA: their political action committees and so on. We have conducted 17 depositions, we have two that are scheduled for next week.

The defendants have also produced, as this document recounts, quite a bit of materials that we are now analyzing and putting into form. We think we are getting just about to the end of what we consider is necessary to the presentation of the case . . .

* * *

[The Court] What is your time frame, how much time are we talking about from this point on?

Mr. Vieira: . . . we ought to be able to get it done, if we really push it, by early December—mid-December. After that it is a matter of preparing a record and drawing up a motion. We have been doing that as we have been going along.

The Court: From your standpoint we will complete all discovery by the 31st of December?

Mr. Vieira: I think we can do that.

A. 3-4 & 8.

Plaintiffs' admission that they "did not then oppose the order"⁶ establishing a discovery cut-off is, therefore, an understatement. Plaintiffs now urge, however, that they ought not be held to the statements made to the court by their counsel on October 13. Their explanation reveals a peculiar and troublesome attitude of arrogance.

Plaintiffs' counsel apparently see their lack of candor before the Court as justified by their desire to conceal an investigation into the supposed "cover-up conspiracy" of defendants and their counsel. It is submitted that no investigation undertaken by a private litigant licenses an attorney to be less than frank before a court of law. Nor should any attorney be permitted to brush aside representations such as those made by plaintiffs' counsel to the District Court on the basis of reasons such as those forwarded in Plaintiffs' brief.

One reason advanced by plaintiffs for representing to the Court that discovery was almost completed and that they would finish by December, when they apparently believed that discovery had been thwarted by a "conspiracy", is that the concerns were not sufficient to bring to the Court. Weeks before the hearing, plaintiffs' counsel had engaged a group of private investigators to surreptitiously interview officials and employees of the defendant labor organizations in pursuit of their hope of establishing a "cover-up conspiracy."⁷ It is difficult to conceive that concerns sufficient to justify such an unusual undertaking were somehow "too fragmentary" to

⁶ Petition, 18.

⁷ The ethical propriety of actions by National Right to Work counsel representing plaintiffs in this regard was the subject of a motion to censure made by defendants. This motion was denied by the Court in its April 4, 1979, order.

bring before the District Court. A review of the Petition demonstrates that plaintiffs had a substantial amount of the "evidence" relied upon to establish the "cover-up conspiracy," including that which purportedly implicates defendants' counsel, well before October 13. One would assume that a party would approach the court to seek its assistance in dealing with the problems supposedly encountered by plaintiffs.

Another reason advanced by plaintiffs for their misrepresentations is that "prematurely to have revealed the private detective's activities would have alerted the UTP to what he had uncovered." This statement is based on the thoroughly inappropriate assumption that plaintiffs, through their private investigators, could more effectively deal with the alleged "conspiracy" than could a United States District Court.

Similarly, the professed hope of plaintiffs' counsel that subsequent witnesses would testify "properly" is inconsistent with their actions in dispatching private investigators to Minnesota. Further, such a "hope" cannot logically constitute a reason for plaintiffs' failure to indicate even the slightest of problems to the District Court.

An alternative explanation for the actions of plaintiffs' counsel on October 13 is that the statements made to the District Court were in fact sincere. As the agreed-upon deadline approached, however, plaintiffs' counsel simply got "cold feet" concerning trial of the case and decided to concoct some type of "conspiracy" to justify a prolonging of the discovery process. This explanation is supported by the flimsy, though admittedly not brief, nature of the "conspiracy" scenario forwarded by plaintiffs.

A trial court is entitled to take at face value the statements of counsel practicing before it. It is entitled to presume that

counsel means what he says when he agrees to the substance of a proposed court order. Plaintiffs may not complain about the terms of a discovery cut-off date which they agreed to.

The District Court was also well within its discretion in refusing to grant plaintiffs' motion to reopen discovery, and for reconsideration of its initial refusal. The plaintiffs have had a full and fair opportunity to conduct discovery in this case. During the two and a half year discovery period, plaintiffs have engaged in what can only be described as painstakingly thorough discovery. Plaintiffs have served two sets of interrogatories on defendant unions which in all sub-parts total 371 questions. Plaintiffs have also served at least five sets of formal requests for production of documents. The documents produced in response to plaintiffs' demands number approximately 75,000 to 80,000 document pages. In addition, plaintiffs have taken the depositions of no fewer than 29 staff members of defendant labor organizations and eight persons who are not parties to this action, (including members of President Carter's staff) which depositions consumed approximately 55 days. Further, plaintiffs served and defendants responded to 381 separate requests for admission.*

Plaintiffs rely upon an extensive set of allegations of misconduct in the discovery process by defendants and defendants' counsel. Notwithstanding their numerosity and length, these allegations are wholly without substance.

* Defendants detailed the extent of completed discovery in their brief before the District Court, A. 24-31.

Defendants responded to plaintiffs' allegations in the District Court by pointing out the fallacies which saturate plaintiffs' charges.⁹ These fallacies include:

1. A refusal to accept that defendant labor organizations are or behave in any fashion other than as a well-oiled and highly centralized machines.
2. A charge that any witness who fails to recollect with absolute precision a matter deemed relevant to plaintiffs' case is either "evasive" or is "lying".
3. Demonstration of a "contradiction" by either changing the meaning of terms or the subject matter to which the statement is directed.
4. Refusal to believe that any action for which plans were made was not carried out precisely in accord with such plans.

By repeatedly utilizing such fallacies, plaintiffs have constructed their conspiracy. Stripped of such attempts at distorting the record, plaintiffs' "conspiracy" is little more than a fastidiously ornamented mirage.

An example of such fallacious reasoning is plaintiffs' mischaracterization of the testimony concerning the "1340 Club". Plaintiffs charge MCCFA members Sands and Johnson with lying by stating that the 1340 Club never had any significant existence, or had become "defunct".¹⁰ When the unexcerpted

⁹ Throughout their Petition, plaintiffs refer to "uncontroverted" evidence of this "conspiracy". See, e.g., Petition, pp. 27, 30, 37, 47, 52, 53. Defendants reject unequivocally the notion that plaintiffs have presented any evidence of misconduct by defendants or defendants' counsel. Defendants simply refused to burden the District Court with a point-by-point analysis of a 266-page brief concerning a discovery motion. It was and is deemed sufficient to demonstrate the disingenuous nature of the "reasoning" utilized by plaintiffs through illustration. See defendants' brief to the District Court. A. 21.

¹⁰ Petition, p. 17, 19.

testimony from depositions is read, there can be no doubt as to the candor of the witnesses. Sands and Johnson never denied the existence of the 1340 Club—in fact, Sands described the 1340 concept, A. 114. Both expressed the subjective opinion that the 1340 Club “structure was never completed sufficiently to become a reliable vehicle in any useful way.” A. 114. And while both indicated they had lost touch with the 1340 Club, neither stated that they knew that the 1340 Club was no longer in existence. According to Johnson:

As far as I know it's defunct or on somebody's back burner somewhere. . . .

Well, my response yesterday was a response to your question about whether or not there might still be some individuals who at one time had identified themselves as members of the so-called 1340 Club, and could they be called upon at a moment's notice or short interval of time to perform some legislative or political function, and my response was that I wouldn't be a bit surprised if there were some areas in the state, a small number I suggested of 134 legislative districts where there still could be individuals that could be called on the telephone and we could ask to get involved in some manner.

I indicated yesterday that I haven't heard anything from the 1340 Club. I used the word “defunct” to describe it. There doesn't seem to be any action going on associated with an attempt to organize it, reorganize it or keep it going. If such action is ongoing, I'm unaware of it.

A. 110, 112. According to Sands: “I'm not aware if the 1340 exists.” A. 115. From this testimony, plaintiffs leap to the conclusion that Sands and Johnson testified that the 1340 Club “was no longer operative”. Pet. A., 314. The lynchpin in this

assertion is a tactic repeatedly used by plaintiffs: the "he must have known" argument. Because Sands, according to one person, is "politically active", therefore "he must have known" about the 1340 Club up to the present day. Pet. A., 317. Such leaps in reasoning are typical of plaintiffs' arguments. It is submitted that the testimony of Sands and Johnson can be thought to be untrue only by a party determined to prove a "cover-up conspiracy" and unwilling to accept without embellishment what the testimony really says.

Plaintiffs claim that Joseph Letorney, who is an NEA Governmental Relations Consultant "testified evasively". The appendix references used to support this charge demonstrate several of the fallacies upon which their charges of wrongdoing lie. One such fallacy is demonstrated on pages 250-251 of petitioners' appendix. First, plaintiffs' counsel asked Mr. Letorney a very specific question: Had he supplied the names of teachers to help operate a phone bank? He answered no. Plaintiffs then take a very general statement by Mr. Letorney that he encouraged organizers of the campaign to obtain volunteers and organize a phone bank, and claim that it is inconsistent with the earlier statement. Upon this "inconsistency" they charge Mr. Letorney with "untruth." The absurd nature of plaintiffs' claim is obvious. Mr. Letorney's statement that he did not supply names of teachers for the operation of a phone bank is not in any way inconsistent with the fact that he encouraged the solicitation of volunteers and the establishment of a phone bank.

On pages 253-258 of petitioners' appendix plaintiffs demonstrate the illusory nature of the basis of their claim of evasive testimony. On those pages Mr. Letorney is asked if he arranged for the presence of two NEA staff persons, Mr. Lathrop

and Mr. Hammer, at a campaign headquarters. Mr. Letorney stated that he did not arrange for Mr. Lathrop's presence, and did not recall arranging for Mr. Hammer's presence. He testified further that he did not know who arranged for their presence. For some reason plaintiffs charge that this testimony is "evasive." The apparent basis for this charge is that plaintiffs' counsel does not believe the testimony. Pet. A. 258. However, counsel's unfounded belief that a witness is lying provides no factual support for a charge of wrongdoing.

The specious nature of petitioners' allegations is further demonstrated by analysis of their contentions of a "cover-up" regarding the NEA's procedure for the endorsement of a 1976 presidential candidate. For example, NEA employee Stanley McFarland, is accused of denying that such a procedure existed, Petition p. 19, when, in fact, he stated there was a time line for the endorsement by NEA members. Plaintiffs true complaint appears to be a linguistic dispute with McFarland's use of the term "time line" as demonstrated by the following colloquy:

Q. [by Dr. Vieira, for plaintiffs] . . . I find it very difficult to believe that at no period of time did someone sit down and draw up the simplest outline of what you hoped or anticipated . . . you were going to do.

A. [Mr. McFarland]. Certainly, there was a time line.

Q. That's what I mean by plan. You had a time line.

A. It is a time line.

A. Sometimes to me a plan is a plan. We live in different worlds.¹¹

Pet. A. 199 n.90.

¹¹ An example of a similar fallacy is found in the charge by Plaintiffs that MEA employee Gene Mammenga has testified untruthfully. The errors in Plaintiffs' reasoning were explored in the brief before the trial Court. A. 45.

Plaintiffs flatly allege that defendants' counsel are part of the supposed "cover-up conspiracy". The primary evidence advanced in support of this charge, both here and before the District Court, lies in the recollection of a statement allegedly made by MEA employee Kenneth Bresin while surreptitiously interviewed by one of the detectives hired by National Right to Work lawyers.¹² During his deposition, private investigator, Jeffrey B. Saunders recounted this conversation:

Q. You said in the course of this conversation, he made some mention that his hands were tied with respect to organizing teachers.

A. Right. I said, 'How do you go about organizing teachers?'

He said he, personally, couldn't do anything, that his hands had been tied, that because of the lawsuit with the National Right to Work Foundation, NEA's attorneys had advised him not to get involved.

Q. Now that's the phrase he used or term he used, 'NEA's attorneys'?

A. Yes, he did.

Q. Advised him not to get involved in what?

A. On company time. He said as a consequence, he has had to work on behalf of Fraser on his own time, after 4:30 p.m.

Pet. A. 264-265.

Accepting this testimony as absolutely accurate, it is impossible to fathom how a "cover-up conspiracy" engineered by defendants' counsel can be adduced from the record. "NEA attorneys" gave legal advice to their clients. Defendants' counsel are unaware of any legal or logical basis for the proposition that such conduct amounts to a "conspiracy".

¹² Petition, pp. 18, 27 n. 18.

Plaintiffs also allege that defendants' counsel withheld documents in connection with discovery proceedings. Defendants presented the District Court with the Affidavit of Eric Miller, as well as with evidence from the record which refutes this contention. A. 48-103. Specific limitations concerning correspondence files were subject to negotiated agreement between the parties. A. 96-99. Plaintiffs' counsel never objected to the results of such negotiations. Employees of defendants familiar with the files participated in document production. A. 40. At no time prior to December 30, 1978 did plaintiffs' counsel express any objection to the quality of document production nor did they ever move the Court to compel the production of any documents.

In particular plaintiffs express concern about document production from the NEA Archives.¹³ In complaining about the "unilaterally limited production", however, plaintiffs omit mention of a court-ordered limitation on production to those documents "concerning activities related to the campaigns of candidates for election to public office".¹⁴ As to the comprehensiveness of those documents which were produced, the testimony of long-time NEA Archivist Alice Morton is in point:

"Q. (by defendants' counsel Mr. Selzer) Did you show me all of the areas where you were aware that there would be materials relevant to this document request?

"A. I did.

"Q. And did I, before that, describe to you the type of request that we were concerned with?

"A. Yes, and the date.

"Q. And did you observe that Ms. Hanna and myself searched all the places that you designated?

¹³ Petition, p. 23.

¹⁴ Order of Magistrate Renner. A. 118.

"A. Yes, and—I made sure you did.

"Q. And can you think of any place that we did not look where you, based on your experience in the archives, would expect to find material relevant to this document request? Was there any place that we overlooked?

"A. No, other than the materials, information that would be found in the Reporter, and Today Education, and News, NEA News.

"Q. Publications?

"A. Those materials which you explained to me, that the plaintiff already had had, that you explained, and also the NEA handbooks."

Deposition of Alice Morton A. 113. Defendants' counsel have produced documents in a manner perfectly consistent with the good faith demanded by the Federal Rules of Civil Procedure. No "cover-up conspiracy" is to be found here.

Plaintiffs similarly allege that defendants have engaged in the destruction of documents. This claim is a gross exaggeration. Plaintiffs refer to, at most, two isolated incidents.¹⁵ In one of these, the testimony of Robert Harmon (an employee of the National Education Association) taken in late 1978 indicated that some pre-1976 correspondence files had been destroyed. In the other, the testimony of Stanley McFarland, another NEA employee, indicated a belief that some documents might have been destroyed. Given their worst construction, this is hardly evidence of wholesale destruction pursuant to some "cover-up conspiracy". In both cases, any destruction taking place pre-dated specific requests for the documents

¹⁵ Pet. A. 190-192.

sought. Given the breadth of discovery in this case and the size of the organizations involved, two isolated examples of failure to maintain documents can hardly be surprising, or considered evidence of bad faith.¹⁶

Plaintiffs' persistent accusation of bad-faith denial of Rule 36 Requests for Admission is groundless. The District Court was provided with examples of plaintiffs' Rule 36 requests, and explanations why agreement to many of them was impossible. A. 36-39. Defendants' philosophy was straightforward: admissions were confined to facts, and not extended to the legal theories and conclusions of plaintiffs' counsel. It is difficult to conceive how such a posture can be characterized as "stonewalling".

¹⁶ It should also be noted that plaintiffs have never sought, nor the Court issued any order restricting disposal of documents by defendants.

CONCLUSION

The record in this case establishes that neither defendants nor defendants' counsel have engaged in any type of misconduct in connection with discovery. The three-judge District Court was fully justified, after consideration of the briefs before it, in denying plaintiffs' motions and upholding the termination of discovery. Certainly, there has been no abuse of discretion as would justify the issuance of a writ of mandamus. Accordingly defendant labor organizations respectfully request the Court to deny petitioners' motion in all respects.

Respectfully submitted,

ERIC R. MILLER
KEITH E. GOODWIN
DONALD W. SELZER, JR.
MARK D. ANDERSON
OPPENHEIMER, WOLFF,
FOSTER, SHEPARD
AND DONNELLY

1700 First National
Bank Building
Saint Paul, MN 55101
*Attorneys for Defendant
Labor Organizations*

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-74 Civ 659

LEON W. KNIGHT, et al., Plaintiffs,

vs.

MINNESOTA COMMUNITY COLLEGE FACULTY, et al.,
Defendants.

Motion in the above entitled matter came on before the Honorable Donald D. Alsop, one of the Judges of the above Court, at St. Paul, Minnesota, on October 13, 1978, commencing at 9:30 a.m.

Appearances:

WILLIAM E. MULLINS, Esq.
and EDWIN VIEIRA, Jr., Esq.

Appearing on behalf of
Plaintiffs

DONALD J. MUETING, Esq.,
ERIC MILLER, Esq., and
STEPHEN BEFORT, Esq.,

Appearing on behalf of
Defendants

[2] Whereupon, the following proceedings were had:

The Court: It seems to me I might just as well go with that Knight matter first because I don't think that will take us 15 minutes, and rather than have all those other lawyers wait, I think we can take care of that.

So, if you want to wait just a moment—what is your pleasure? Do you want to wait a few minutes?

Mr. Mingo: We can come back.

The Court: Whatever is more convenient to you. Do you want us to take a break? I leave it up to you.

Mr. Mingo: We will take a break.

The Court: We will let you know.

Two things come to my mind: First when I see Mr. Mullin I should tell you that last weekend I, among other things, read a book entitled the Sixth Word by Mr. Lebedoff (ph) as I am sure you have read. I have had Mr. Opperman in my court any number of times and somebody told me because of that I should read the Sixth Word and on the first page it was all about William Mullin.

Mr. Mullin: I want the Court to know that in the ten years that have elapsed since that book was written I have changed my ways. Anything you have read in that book would not now be applicable.

The Court: I'll let that pass. But, it was interesting, I had read the 21st Ballot previously. I like his [3] style of writing.

Secondly, about a month ago, or three weeks ago I had my able assistant Ms. Palmer prepare a list of cases '74 and earlier. I came on the bench in January of '75, so anything '74 and earlier are cases that I came to by way of inheritance. The rest of them I have to assume full responsibility for and I am delighted to report that yours was on that list and the list is down to about eight or ten now, maybe six. You people will soon have the distinction of having the oldest case on my calendar or thereabouts; which may or may not be considered a distinction, and I thought I haven't looked at your case for so long I kind of lost track of it, or what is going on to be sure, and I thought it might be helpful—I know it would be helpful

to me at least if we could just get together for a few minutes and have you tell me where we are at and where we are going, and how we are going to get there.

As we all know it is now a three judge case and there is nothing I can do with it except to see how it is doing and report to my brethren as to what we might expect in the future. I see you have 50,000 pages of documents produced, among other things, and knowing my other two brethren on the three judge panel, they are going to be overwhelmed when they see that number.

For the plaintiff who wants to tell me where we are at and where we are going or how we will get there and what we [4] should do to do something with the case.

You are from Washington, as I remember?

Mr. Vieira: Maryland, sir.

The Court: All right.

Mr. Vieira: The first thing I want to assure Your Honor of is we have no intention of asking Your Honor, or the other judges to read any 50,000 pages of documents. I have had the unfortunate pleasure of looking at most of those pages. Our intention is to, as much as possible, to distill that material, synthesize it, and get it in tabular and summary form and present it in that fashion; in what we hope will be a convenience for both the Court and clerks to deal with.

Now, as this summary prepared by Mr. Miller recounts, we have been, since early in 1977, conducting depositions of various individuals who fulfilled leadership rolls in the NEA, MEA, MCCFA; their political action committees, and so on. We have conducted 17 depositions, we have two that are scheduled for next week.

The defendants have also produced, as this document recounts, quite a bit of material that we are not analysing and

putting into form. We think we are getting just about to the end of what we consider is necessary to the presentation of the case and we hope that as soon as that is finished we are going to be able to prepare more or less straight forward summary judgment motions, no hearing, calling of witnesses, and [5] so forth being required; that all of the constitutional issues at least can be decided on the basis of documents that have been produced and introduced as exhibits in depositions, and on the basis of depositions and affidavits. So there won't be any necessity for any prolonged proceedings.

It is no secret to anyone connected with the case that the plaintiffs' position here is that the NEA and various other organizations constitute something very much akin to a political action organization or political party. That is what we are trying to prove. There is no dispute about that. There has never been any dispute as to our contention. We think now that we have reached the crux of the case because the two witnesses that are to be called next week, Roslyn Baker (ph) and Stanley McFarland (ph), are two of the leading figures in the NEA's Governmental Relations Department; and we believe that they have had, during 1976 and perhaps earlier, significant and substantial contacts with particular politicians, candidates for elective office, and in particular Mr. Carter and Mondale, they were very much involved, along with others, with the NEA and affiliate organizations in that 1976 Presidential Campaign.

Besides those two individuals we have subpoenaed five others, four of whom are on Mr. Carter's staff in the White House—Hamilton Jordan being one figure I am sure you are familiar with by name, and at the present time we are having discussions with their counsel in Washington for the production [6] of affidavits or documents from them so we won't have to bother with any depositions.

Our plan is a very simple one, I hope it is a straight forward one, as soon as we are finished with Baker and McFarland next week we have at present a list of four or six people, at the most six, that we would want to call to finish up the depositions.

As Mr. Miller has suggested here on this summary, there are some documents, six requests for the production of documents that the NEA and MEA have yet to produce. We think we will have another couple of pages for document requests, especially after we have heard from McFarland and Baker.

After that, as far as we are concerned, we think we will have adduced all the evidence that we believe is necessary to prove the contentions that we have made.

The Court: You are intending to make a motion for summary judgment to be attached with an outline or a synthesis, as you call it, of the documentary evidence whether it be by way of deposition or documents that have been produced up to this point?

Mr. Vieira: What we hope to do is take the relevant portion of all of the documents, all the documents have been introduced at one state or another, or they will be by the time summary judgment comes up, we will take the relevant pages out of those documents and prepare a large appendix to our [7] summary judgment brief, cross-referenced completely to the brief and to the depositions, and so forth and so on, and that would be what would be presented directly to the Court.

The Court: At one time there was the hope that we could prepare—you could prepare a stipulation of undisputed facts. Now I know you put some energy on that but I have the feeling that maybe it was not productive. What is your—

Mr. Vieira: Well, it was and it wasn't, Your Honor. We presented the defendants with 300 or so requests to admit cer-

tain facts and they admitted some and they denied others and we had conferences with them over the various types of language that we wanted or they wanted. Sometimes we compromised and sometimes they did; and sometimes neither of us did. The short answer was the final request we made, which was that the defendant organizations, the NEA, MEA, MCCFA, and so forth, are substantially engaged in certain types of political activity was denied and that is the ultimate conclusion of fact that we are trying to prove.

The Court: Were there any fact, or was there any stipulation of undisputed facts of any kind that either has been or will be produced so that we have some framework within which to operate?

Mr. Vieira: Yes, sir. I am not sure of the number, maybe Mr. Miller can suggest it, but there is a goodly number of the requests to admit that were admitted and I don't [8] think we are going to have any problem with respect to Mr. Mueting's defendants, that is the State officials, as to how the MCCFA was certified, how the collective bargaining agreement was negotiated, what the MCCFA has been doing with respect to the Community College Board—

The Court: I am talking about a document that will be described as a stipulation of undisputed facts rather than having to go back through the requests for production, or the requests for admissions, and make—go back and dig into this file. Is there going to be a document which will have a stipulation of undisputed facts, at least to the extent that there are certain facts about which there is no dispute? I thought that you had put your efforts and energy towards trying to produce that; and I also thought it wasn't successful, but it seems to me there must be come things which would give us as judges a framework to start with and say, "these are the undisputed facts".

To be sure there will be other disputed facts, but has there been any effort to generate such a document?

Mr. Vieira: No. Aside from the work we did on the request to admit, we haven't sat down—

Mr. Mullin: I should add Mr. Mueting and I have been working on a document between the plaintiffs and the defendant State officials that would summarize the mechanics of the operation of the statute that is under challenge; and there are really no disagreements we know of about language. We have been [9] discussing this document because of the pendant—the fact that other discovery has been pending we haven't finalized it, but with respect to those matters and with respect to—perhaps with respect to other mechanical matters we can work out with the defendants, such documents are possible here, Your Honor.

The Court: It seems to me there must be some areas about which there is no substantial dispute on the facts. To be sure there may be others about which there is substantial dispute, but it seems to me that the attorneys—I will hear from all of you—that the attorneys ought to be able to prepare a statement of uncontroverted facts—not agreeing they are all relevant or they all have bearing on the issues, but at least to give us a starting point from which to work. I think that that would be helpful to myself, at least, and helpful to the other judges too.

What is your timeframe, how much time are we talking about from this point on?

Mr. Vieira: The thing that has actually taken the time in these depositions from '77 to today has not been the time that has been used in the depositions. Like I say, we have 17 people so far. Most of the depositions have been one day to two days, some half a day, so it is about 35 days total. What has been

the actual time lag has really been a scheduling matter. We have bent over backwards not to try to call in Mr. Miller's people when they have had some other commitments and [10] so on and so forth.

I think with respect to the ones we are talking about after Baker and McFarland we ought to be able to get it done, if we really push it, by early December—mid-December. After that it is a matter of our preparing a record and drawing up our motion. We have been doing that as we have been going along.

The Court: From your standpoint we will complete discovery by the 31st of December?

Mr. Vieira: I think we can do that.

The Court: And, how much time would you need to prepare the motions and your supporting material and background data?

Mr. Vieira: I think if we had at the outside 45 to 60 days we can put the whole thing together. We have been working at it as we go along but as Mr. Miller suggested there is a lot of material here, you are talking about an organization that has 1.8 million members.

The Court: All right. Now who should I hear from first, the State or the organizational defendants? Do you represent all of the employee organizations?

Mr. Miller: We do, Your Honor.

To try to avoid a depressing note, when Edwin recites that there are a million eight NEA members they certainly are not all involved, although there has been times I have wondered [11] in light of the scope of discovery.

The summary I have prepared, Judge, I won't go over. You have had a chance to previously review it, there has been a substantial amount of discovery in this case.

The Court: This summarizes the discovery that has taken place to date?

Mr. Miller: It does.

The Court: All right.

Mr. Miller: The brunt of it has taken place in a little over two years now, We have been doing nothing but discovery. As the summary indicates we have answered over 350 interrogatories. We have produced over—

The Court: Excuse me for interrupting, you will be happy and thrilled to know at our Judges meeting yesterday we adopted the Minnesota practice, as in Chicago, or the Northern District of Illinois, of limiting written interrogatories to fifty. That works in State court pretty well, doesn't it?

Mr. Miller: It does, Your Honor, on a certain number of cases.

Mr. Mullin: It's too late.

Mr. Miller: I could add it is too little, too late. We have answered more than 350 to date. Our estimate of 50,000 pages is a conservative one. There are some more documents which we have consented to produce and we are going to produce very shortly, so the number is going to be edged upward.

[12] We have had a substantial number of depositions, and by just the titles of the people, Judge, you can see that all of the principles and some folks who would probably rank in the next echelon in terms of officers and professional staff of all of our clients have been deposed; along with at least one of the State defendant officers.

We have responded to 381 requests for admission. Let me stop on that point: those admissions or requests, Judge, consisted of this book right here and then another stack about another ten to twelve inches in height of documents. We have admitted to the authenticity of every document that has been submitted to us that has been produced in the course of discovery. I won't show you the responses we put in, but in answer to

your inquiry we have admitted to a substantial number of fundamental facts in this case.

We had suggested a long time ago, as I recall a year ago this last summer, that we try our hand jointly at a stipulation of facts. We have had some encouragement from Your Honor on that point. Now we started out in that vein but it ended up with the plaintiff submitting requests for admissions. We had difficulty with some of those requests and we have either denied them or some of them we have admitted in a limited fashion.

If we were to take our responses to those requests for admissions we would come up with a fairly fundamental framework in terms of admitted facts. I do not know how much beyond [13] that the plaintiffs intend to persist on their characterization of the facts. I am at a loss, therefore, to frankly report to you where I think we are going to end up in being able to completely stipulate and agree to the facts.

I will be candid with you in light of what I preceive to be some of the purposes or goals of the lawsuit. I don't think we are going to be able to completely agree. I think we are going to be in conflict on certain facts and we may very well have to return to the Court and I think we are going to have to, to seek some direction from you as to how we are going to handle that, whether it is going to be handled in affidavit form or whether we are going to have to have perhaps some limited live testimony.

In terms of what I preceive to be the first things first, Edwin has given us a schedule as to when he thinks he can complete his discovery and that is by year end. In my view the discovery should terminate upon the completion of those two depositions that he has referenced next week which are to be taken in Washington, D.C., all next week; and upon our producing the documents that remain.

I don't want to take the Court's time any more than to tell you the remaining documents to be produced consist of correspondence out of the Central Administrative Offices of the NEA; consisting of a fair amount of material. All of that material has already been produced on behalf of the other employee organizations. [14] I find it very difficult to understand the necessity for up to six or more depositions, assuming that they are of my clients, I find it very difficult to understand what additional documents are going to be requested, as recited by Mr. Vieira, after the two depositions are taken next week.

I will be very candid with you, we have been very open in terms of responding to this discovery. We have not come to Your Honor in terms of seeking protective orders and the like; we have gone, I believe, more than—to use a very poor pun—our fair share in responding to this discovery. I think it should terminate and, very frankly, if we are going to receive some additional discovery requests I will place everyone on notice that we may have to return to the Court in order to limit that discovery. We have had a lot of discovery, it has been expensive, and the 50,000 pages that I mentioned, as I say, one, is conservative; those pages have been plucked out of many more times than 50,000 pages to arrive at those. My office has spent a lot of time in Washington, D.C., looking through records there as well as here in Minnesota. We are not interested in going any further.

I would, I guess, urge the Court to consider cutting off discovery or, at a minimum, placing a date for that discovery which the plaintiffs want to propose to be submitted so that we can immediately assess it and if we have to, return to Court.

[15] We want to get the case underway in terms of first completing discovery and get it on for a motion. It has been pending four years this December.

The Court: All right. Who is going to tell me about the State's position?

Mr. Mueting: Your Honor, Don Mueting from the Attorney General's Office. As Mr. Mullin indicated we have been working on a proposed stipulation of facts. I really can foresee no difficulty in arriving at a stipulation of facts to indicate to the Court the workings of the Public Employment Labor Relations Act, with regard to the relationship between the State defendants and the Minnesota Community College Faculty Association.

We have been waiting in the bullpen, so to speak, during this entire period. We haven't been intimately involved in the discovery, we have been monitoring it. I really can foresee no problems in arriving at a stipulation. We have discussed it in some detail and there really aren't any factual disputes with regard to the application of the Act in this particular instance.

We also will, I might add, talking about a second stipulation, in which a number of parties will be added to the lawsuit. Since it was filed in 1974 we have had some changes on the Board, Community State Board for Community Colleges, and we have had changes with regard to presidencies of colleges involved. [16] So, that will also be taken care of by way of stipulation.

Other than that, Your Honor, we are prepared to go to trial whenever the other parties are.

The Court: When you say trial, what do you envision a trial—what form do you envision it to take from your point of view?

Mr. Mueting: From our point of view I think we can handle it by way to stipulation on all facts. I don't think there is anything in dispute and summary judgment would be entirely appropriate as far as we are concerned.

The Court: As far as the State defendants are concerned, your discovery is completed?

Mr. Mueting: I believe we have supplied the plaintiffs with everything they have asked for.

The Court: I am talking about your discovery.

Mr. Mueting: Ours is completed.

The Court: So the State discovery is completed in the sense that you don't have any more to do?

Mr. Mueting: That is right.

The Court: Now do you anticipate making a motion for summary judgment on behalf of the State defendants so that the matter would be submitted to us on motion for summary judgment by all parties or will you just—how will you handle it?

Mr. Mueting: We haven't really decided how we are going to handle it. We were waiting actually to find out [17] what is going to happen between the plaintiffs and the employee defendants; to see how they are going to resolve their differences.

We will be prepared, if that seems appropriate, to submit this on motion for summary judgment, but we haven't made that decision at this time yet, Your Honor.

The Court: How about the discovery—I think that is all for your part, Mr. Mueting—How about the discovery for the organizational defendants that they want to initiate? Does that complete it?

Mr. Miller: Yes. We have taken one deposition as reported in that summary. We do have some outstanding interrogato-

ries to the plaintiffs which have not been answered; and depending on the road before us on stipulating, we may have some difficulties in that we served interrogatories—those which have been answered we were essentially told in response to contention interrogatories, we just went down their complaint and asked them for the facts underlying various allegations such as misrepresentation by some of my clients concerning what the Fair Share fee included. The response that we were uniformly given was we are still in the course of discovery and we will tell you in our trial brief. Well, that is not completely satisfactory from our point of view. If we can work out the stipulation of facts so that we understand which facts the plaintiffs in fact are relying upon in their complaint, we won't [18] have much trouble. But I do want to alert the Court that there are some—what I perceive to be potential, outstanding, problems in terms of arriving at an agreement on these facts.

A brief review of the requests for admissions I think will probably give Your Honor the best idea of the differences between the plaintiffs and my clients.

The Court: I am not suggesting that I am in a posture, nor do I feel the case indicates that I can expect that you would stipulate to all facts. Obviously there are going to be some differences of opinion as to what these depositions show. But, at the same time, there has to be a large area of facts about which there is no dispute and rather than for us three judges to sit down and browse through 18 depositions, or whatever number there are, it seems to me that the orderly fashion to do it is to have the attorneys prepare a stipulation of facts to the extent that they can. There are undisputed facts.

Mr. Miller: There is no dispute on that Judge. We have tried to do that, and we have done it in part through those requests for admissions.

The Court: All right. Now are you going to be making a motion for summary judgment or are you going to rely on letting the—suppose that the plaintiff were to make a motion for summary judgment and we were to deny that motion. We still have a lawsuit pending. Where are we at then?

Mr. Miller: Your Honor, I anticipate that assuming [19] we reach an understanding first on the facts that we can agree on, and we have an idea of what we cannot agree on, that all of us, all three corners of the lawsuit, I would anticipate would be before the Court on cross-summary judgment.

The Court: So you anticipate making such a motion too?

Mr. Miller: Yes, sir.

The Court: Even though you say there is a possibility that you would have to—you would want to present some live testimony?

Mr. Miller: That may be a possibility and if we cannot work out a mechanism for resolving that conflict, then we may have to go to that; or by affidavit.

The Court: Have I heard everybody now? Have you got any more you want to add in light of what these people have suggested?

Mr. Mullin: I think it might be helpful if I comment a little bit on the attempts to develop a stipulation of facts that have taken place so far.

We had discussions with the attorneys for the defendant labor organizations and it was agreed on both sides that the plaintiff should initiate the procedure and that—and get the ball rolling by presenting them with something in writing. And, as you have already been told we decided to do that in the form of request for admissions without the formality and the [20] requirement of response would be helpful in moving things along. So, we did prepare and serve on defendants 300

plus requests for admissions. Each one of those requests contained with it an interrogatory. The interrogatory requested that the defendant, if they denied the request, that they state what it was about the request that required the denial.

The responses that we received, as you have already been advised did move things along substantially in that there were substantial admissions as to the authenticity of documents. We are not going to have any problems that I know of with respect to the fact that a document is what it purports to be.

With respect to any attempt on our part in the request for admissions to describe, characterize, summarize, or generalize with respect to what the defendant labor organizations do, and what they are, we had a flat denial and the interrogatories were not answered because they were objected to uniformly.

So, as Mr. Vieira said we had extensive meetings in which we satisfied ourselves that the problems with these denials had to do with generalizations, descriptions, characterizations, and attempts to summarize what the defendant labor organizations do and what they are; which is at the heart of our case.

So, at the conclusion of these discussions we said [21] we feel we have—both sides agree we have gone as far as we could with our attempts to present this. So, we then said, "well, you try it". If you think our characterizations are loaded or unfair, or so on, you try a neutral characterization. We were then told that—by the defendant labor organizations—that that is not our job, it is your job and we are not going to do it. So, we got no feedback from them as to how they felt what they do and are could be summarized and characterized. We then said if you are not going to do that, that means that we are going to have to establish what these payments do and are. I think I used the words that that is going to require the writing the history of World War II; and we were told so be it, that is too bad, if that is the way it is going to be, fine.

That is the context of it, of the problem that the plaintiffs have been working on in getting the discovery that they have taken, taking the depositions and the like.

The only thing I can say is that in working on that problem from our side, we have fought long and hard about how to summarize—perhaps not in an agreed summary, but in a summary that we can present to the Court, all the documentation that we have gathered so that the limit that the Judges will be required to read will be as little as possible. We recognize that that is a very—next to winning the case, that is the most important thing that we have on our minds right now. We are going to do everything we can to accomplish that. We do not [22] anticipate presenting any live testimony. I want to make that clear right now. I don't know what other parties have in mind when they say they might require—might do that. We are not going to do that.

The Court: I can tell all of you that there is an extreme reluctance on the part of all of us, I guess to start taking live testimony in a three judge court case.

Mr. Mullin: We understand that.

The Court: You all understand that?

Mr. Mullin: And we are, from the beginning, we have been aware of that reluctance and we have never planned to do that.

So, what you are going to get from us is going to be fairly large in terms of the number of documents that back up our summaries and characterizations, and so on; but we do not anticipate that every piece of paper that we present to the Court to summarize our characterizations and generalizations will have to be read.

I would imagine that only with respect to the ones that the defendant labor organizations really hone in on and say that is really not true, or we really didn't have the kind of involve-

ment that you are saying we had and for example in the 1976 Presidential election it may be necessary for some reading of documents to satisfy the Judges as to who is right.

Anyway, I just want you to know we are aware of [23] the Court's concerns and we are working as hard as we can to meet them.

The Court: Well, I am going to do this: There is no way I can judge the appropriateness or inappropriateness of the four or five additional depositions to which you make reference to, Mr. Vieira, but number one, I will report to the other judges the summary that you have given to me; and just in a brief way your observations today.

I will issue an order which does two things, it closes discovery in the case on the 31st of December—so if you want to take any additional depositions or whatever else you want to do by way of your discovery, it will all be completed by December 31st. Now that may also involve your producing documents or answering outstanding interrogatories of the defendants, and if you are not satisfied with the answers that you get in that connection, then the only thing I can suggest is that you will have to bring on a motion to compel additional answers. You have done a lot of work together, I know, and I encourage you to keep doing that.

Mr. Mullin: You Honor, with respect to that, Eric is correct in saying that we have declined to respond to some of these interrogatories that have asked the plaintiffs what it is we do and/or are that you object to; what it is about us that makes you complain about having us as your exclusive representative and being required to pay money to us.

[24] It is true and I should advise the Court that we probably will not be able to amend those interrogatories until we have completed discovery, so—

The Court: Well, you have got now two and a half months within which to do it.

Mr. Mullin: I understand. What I am saying is it probably will require some time and it should be a short time after December 31; discovery having been completed by December 31, for us to come back in and say—these are really contention interrogatories, they are not disclosing any facts that we have and are holding back, it is just a question of characterizing them, the evidence that has been developed in the case.

With respect to that I would ask the Court that there be—that we be permitted say another 45 days in which to answer those interrogatories, or 30 days.

The Court: I am going to suggest to you that I want a stipulation of undisputed facts prepared and in to me by the 30th of January. Now if there are contention interrogatories that you need some additional time for, it seems to me you should be able to have those answered in the context of this time frame by mid-January. So, if you want some additional time to answer those so-called contention interrogatories, if I give you to the 15th of January that ought to take care of it.

All right, December 31st discovery will be closed except as to so-called contention interrogatories. I encourage [25] you to do it before that, but if you can't, you will have until January 15 for those.

Simultaneously with that I want you to continue your efforts on this stipulation of undisputed facts. It seems to me that by the 30th of January, or do you want another week on that, it doesn't—well it does make some difference to me—does that give you enough time, that four week period in January?

Mr. Miller: We will sure try.

Mr. Mullin: We will take a crack at it.

The Court: Let's say January 30, 1979, and then what I will do is schedule another get together like this, even now, for the last week in January so we can get together and see how you are doing and if we are on track, and encourage you to be on track because I know how much work you have put on this thing—I can tell by the file that you have been busy—so we will schedule another pre-trial for late January or early February and then, at that time, we can decide how you are going to present the thing by way of your motions or cross-motions for summary judgment, or however.

It seems to me the way to do it is to have three motions for summary judgment, all right?

There are two things that are just impressions that I have about this: Number one is a case out of Detroit and number two is the fact that the Statute has been changed or modified. Now are you addressing the case to the Statute as it [26] now exists, I assume?

Mr. Vieira: Yes.

The Court: Even in its modified form?

Mr. Vieira: Yes.

The Court: All right. So it is a current Statute that we are going to be concerned with?

Mr. Vieira: Yes.

Mr. Miller: That is my understanding, Your Honor. An earlier challenge to the Robinsdale case, which I think the Court is aware of, was addressed to the Fair Share Statute as it existed prior to its amendment in April of 1976—

The Court: Is that the case Judge MacLaughlin wrote?

Mr. Miller: That is the case Judge MacLaughlin wrote and it went to the U.S. Supreme Court and the U.S. Supreme Court denied to hear it on the basis it was moot because the

statute had been amended since the State Supreme Court had decided the Robinsdale decision.

The Court: All right. Is that all? Thank you for today.
(Whereupon the proceedings came to a close)

[27] REPORTERS CERTIFICATE

I, Lawrence P. Lindberg, do hereby certify that the foregoing is a true and accurate transcription of the stenographic notes taken by me in the above-entitled matter.

LAWRENCE P. LINDBERG
Official Court Reporter

APPENDIX B

**IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civ. No. 4-74-659**

LEON W. KNIGHT, et al., Plaintiffs,
vs.

**MINNESOTA COMMUNITY COLLEGE FACULTY
ASSOCIATION, et al., Defendants.**

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION TO REOPEN DISCOVERY**

INTRODUCTION

On December 30, 1978, one day prior to the discovery deadline established by the Court at the October 13, 1978 pretrial hearing, plaintiffs served the present motion to reopen discov-

ery. The motion comes 49 months after the institution of this lawsuit, and on the heels of massive discovery and assurances by plaintiffs at the October 13, 1978 pretrial hearing, that they had "just about [reached] the end of what [they] considered necessary to the presentation of the case . . ." October 13 Pretrial Transcript p. 4.

In spite of the tremendous scope of completed discovery and the October 13 representations to the Court, plaintiffs now seek to reopen all discovery for the articulated reason that defendants have somehow acted in bad faith throughout the two and one-half year course of discovery. The timing of the motion is supposedly supported by plaintiffs' desire to obtain a "complete dossier" of defendants conduct, which effort allegedly warrants their decision to postpone "any revelations to this Court" at the October 13, 1978 pretrial. Plaintiffs' Memorandum p. 82 (hereinafter called Pl. Mem).

On January 19, 1979, plaintiffs served their supporting Memorandum along with attached exhibits and affidavits. The eleven volumes of material plaintiffs have submitted to the Court consists of a 266 page brief, 9 volumes of exhibits, numbering 379, and one volume of affidavits, numbering 15. In spite of its length, the submitted material represents only a minute portion of the documents produced and the deposition transcript pages generated. The very length of this documentation belies the underpinnings of plaintiffs' motion.

As the remaining portion of this Memorandum will elaborate, defendants emphatically and categorically reject the insinuations and innuendoes contained throughout plaintiffs' 296 page Memorandum. The statements in the Memorandum are indicative of an incipient paranoia unfamiliar to defendants' counsel in its standard practice, (witness the suggestion that a "sprung staple" on a particular document somehow

supports the supposition that defendants and defendants' counsel had been repeatedly engaged in inappropriate and even, as hinted in various portions of the brief, illegal activities). Pl. Mem. 175.

Defendants' Memorandum and the attached affidavit of Eric R. Miller will address the history of discovery in this case, the efforts of the counsel to reach an accommodation regarding particular discovery demands and the total inappropriateness of plaintiffs' request to reopen discovery.

I. In Spite of Plaintiffs Belated Protestations, They Admit They Have Been Afforded the Opportunity to Conduct, and Have Conducted, Complete and Thorough Discovery.

The history of discovery will be set forth in Section II below. However, it is informative to the issues at hand to review some of plaintiffs own admissions as to the discovery they have been afforded. The admissions come from the October 13, 1978 pretrial and their January 19 Memorandum and are repeated in *seriatim*.

1. "This [296 page] Memorandum [and 10 volumes of supporting material] also represents a substantial condensation and systemization of the factual material now available in the record . . ." Pl. Mem. 44.

2. "[P]laintiffs have amassed considerable evidence to support their allegations." Pl. Mem. 45.

3. "Since the fall of 1976, plaintiffs have amassed facts showing [what they intend to prove]" Pl. Mem 80.

4. "[P]laintiffs have raised and documented the very-First-Amendment issue [which they assert is at the heart of their claim]" Pl. Mem. 76.

5. [After completion of the discovery set forth in pages 4 and 5 of the transcript of the October 13, 1978 pretrial hearing,] we think we will have addressed all the evidence we be-

lieve is necessary to prove the contentions that we have made." October 13 Pretrial Transcript p. 6.

6. "[W]e ought to be able to [complete discovery], if we really push it, by early December-mid-December." October 13 Pretrial Transcript p. 10.

The above statements totally refute any after-the-fact representation that plaintiffs have not been afforded a full and complete opportunity to discover all relevant facts.

II. Defendants Have Complied in All Respects With Each and Every Discovery Request as Modified.

Reconstruction of the history of discovery in this case is time consuming, tedious and complicated. Nevertheless, the allegations set forth in Plaintiffs' Memorandum deserve more than cursory treatment if for no other reason than to reject the unsubstantiated assertions to the effect that plaintiffs' discovery has been anything less than they requested.

The present lawsuit was instituted on December 19, 1974. Following an initial stay of discovery because of the pendency of and subsequent rulings on certain motions, plaintiffs have engaged in what can only be described as painstakingly thorough discovery. Indeed, the thoroughness of the discovery is demonstrated by their instant papers before the Court.

Plaintiffs have served two sets of interrogatories on defendant unions which in all sub-parts total 371 questions. Plaintiffs have also served at least five sets of formal requests for production of documents. The documents produced in response to plaintiffs' demands number approximately 75,000 to 80,000 document pages. In addition, plaintiffs have taken the depositions of no fewer than 29 staff members of defendant unions and 8 persons who are not a party to this action, which depositions consumer somewhere in the nature of 55 days.

In an attempt to understand and fully comply with the lengthy sets of interrogatories and document demands and the 381 separate request for admission, defendants met on numerous occasions with plaintiffs under the authority of Rule 5, Local Rules of Civil Procedure. As a consequence of those meetings and the understandings reached in those meetings, documents were produced along agreed upon guidelines as is set forth in more detail in the affidavit of Eric R. Miller. The depositions taken and categories of documents produced are as follows:

DESCRIPTIVE SUMMARY OF DOCUMENTS
PRODUCED TO PLAINTIFFS BY
NEA, MEA, MCCFA, IMPACE

NEA

Constitution and By-Laws
Budgets and Financial Statements
NEA Handbooks
Charts of Accounts
Policy Statements re: "Persons Paying Agency Shop Fees to NEA Affiliates" and "Political Activity Rebate Procedure"
"Speaking for Teachers" training materials
Board of Directors' Meeting Minutes
Executive Committee Meeting Minutes
Representative Assembly Proceeding Transcripts
Executive Office Central Correspondence files
Date Books of the President and Executive Director
Correspondence Files of the Goal Area Directors
—John Sullivan—Instruction and Professional Development
—John Cox—Teacher Rights
—Gary Watts—Affiliate Services

—Stanley McFarland—Governmental Relations

Correspondence files of administrative section directors

—Michael Dunn—Administrative Services

—Susan Lowell—Communications

Job descriptions

Business and Accounting documentation reflecting and supporting the NEA Program Budget

Guidelines for NEA-PAC

Government Relations—Monthly legislative reports

Evaluation of the UniServ program

Reports on Leadership Conferences for Education Association state presidents

Committee report re: dues increase

Report on the status of Strikes and injunctions

Documents re: endorsement of the Carter-Mondale candidacy

CAPE documents

Identification of legal case supported by NEA in Minnesota

Identification of cases in which NEA participated as amicus curiae

Correspondence files of Governmental Relations Staff

—Robert Harman—associate director

—Rosalyn Baker—liaison to Federal agencies

—J. Latorney—Government Relations Consultant

—R. D. VanderWoude—Government Relations Consultant

NEA publications

—*Today's Education*

—*NEA Reporter*

—*NEA NOW*

—*NEA Advocate*

Press Releases

Communications and Public Relations Training Materials
Documents from the NEA Archives relating to "political activity"

MEA

Articles of Incorporation and By-Laws
Budgets and Financial Statements
Organizational Charts
Lists of Bookkeeping Accounts
Board of Directors' Meeting Minutes
Delegate Assembly Meeting Minutes
Resolutions re: Fair Share
Lobbyist Registration Forms and Disbursement Reports
Agreements between NEA, MEA and MCCFA
Publications: *MEA Advocate, Window on Legislation, VIP-Briefing Memo, Window on the Legislature*
"Political Action Workshop" materials
Expense Reports (of individuals noticed for deposition)
Job descriptions
Officers and Staff Manual
Negotiations Handbook
Correspondence files of MEA President
Correspondence files of MEA Executive Director
Rules, Regulations and guidelines for UniServ
Income and Expense Reports
UniServ staff training materials
Reports of meetings with legislators
Report of Future Directions Task Force
Precinct Caucus Training Materials
News columns of MEA President, Donald Hill
Correspondence files of MEA staff:

—K. Pratt—assistant director, communications

—K. Bresin—assistant director, governmental relations
Correspondence files of Governmental Relations Council
Chairperson, M. Sokup
Resource files of the *MEA Advocate*
Press Releases

MCCFA

Constitution and By-Laws
Budgets and Financial Statements
Professional Staff Contracts
Board of Directors' Meeting Minutes
Delegate Assembly Meeting Minutes
Resolutions re: Fair Share
Lobbyist Registration Forms and Disbursement Reports
Tri-party Agreement between NEA, MEA and MCCFA
Publications: *Green Sheets* and *News Flashes*
Workshop materials
Legislative Reports of the Executive Director
Community College Contract Ratification Procedure
Certification of MCCFA as Exclusive Representative
Fair Share Payroll Deduction Request Information
Objections from Plaintiffs to the MCCFA re: Fair Share
Expense Reports of Ralph S. Chesebrough
MCCFA files index
Correspondence files of MCCFA President
Correspondence files of MCCFA and MCCFA Executive Director
Training materials of the Executive Director
Calculations re: Fair Share Fee
Documents re: MCCFA "Communications Link"
Committee Reports

IMPACE

Constitution and By-Laws

Budgets and Financial Statements
 Public Filing re: Receipts and Expenditures
 Board of Directors' Meeting Minutes
 Annual Meeting Minutes
 Proposed IMPACE Policy, August 26, 1976
 Correspondence files of IMPACE chairperson
 Treasurers Reports
 Files of Sue Zagrebelny

Depositions Taken by Plaintiffs

<i>Name, Date/Days</i>	<i>Pages</i>
(1) Ralph Chesebrough, February 22-23, 1977 (2) [Executive Director, MCCFA]	266
(2) A. L. Gallop, February 24-25, 1977 (2) [Executive Director, MEA]	211
(3) Calvin Minke, March 4, 1977 (1) [Treasurer, MCCFA]	83
(4) James Durham, March 7, 1977 (1) [President, MCCFA]	133
(5) Donald Hill, March 9, 11-12, 1977 (3) [President, MEA]	303
(6) Fulton B. Klinkerfues, March 15, 1977 (1) [Chairperson, IMPACE]	176
(7) John Schutt, March 18, 1977 (1) [Treasurer, IMPACE]	51
(8) Alfred Provo, March 31, 1977 (1) [Treasurer, MEA]	92
(9) Herbert Brunell, April 19, 1978 (1) [Controller, MEA]	53
(10) Gene Mammenga, June 12-13, 1978 (2) [Director of Governmental Relations, MEA]	292
(11) Neil Sands, June 14, 1978 (1) [Past-President, Committee member, MCCFA]	162

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(12) Michael Sokup, August 28, 1978 (1)	243
[Chairperson, Governmental Relations Council, MEA]	
(13) Roger Johnson, September 7-8, 1978 (2)	285
[member, MCCFA, member IMPACE Board of Directors]	
(14) Terry E. Herndon, April 25, May 18-19, 1977	
(3) [Executive Director, NEA]	443
(15) John E. Ryor, May 10-11, 1977 (2)	394
[President, NEA]	
(16) Michael Dunn, August 2, 1977 (1)	123
[Assistant Executive Director for Administration, NEA]	
(17) Gary Watts, July 18-19, 1978 (2)	444
[Director, NEA Field Services, Affiliate Relations]	
(18) John Cox, July 26, 1978 (1)	240
[Director, Teacher Rights, NEA]	
(19) Joseph Latorney, July 24-25, 1978 (2)	427
[Governmental Relations Consultant, NEA]	
(20) Phillip Helland, July 12-13, 1977 (2)	142
[Chancellor, Minnesota Community College]	
(21) Stanley McFarland, October 17-18, 1978 (2)	520
[Director, Governmental Relations, NEA]	
(22) Rosalyn H. Baker, October 19-20, 1978 (2)	398
[contact with Federal agencies, NEA]	
(23) Kenneth Pratt, November 21, 1978 (1)	169
[Assistant Executive Director for Communications, MEA]	
(24) Kenneth Bresin, November 16, 1978 (2)	157
[Assistant Director for Governmental Relations, MEA]	

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(25) R. Dick Vander Woude, November 20, 1978 (1)	129
[Governmental Relations' Consultant, NEA]	
(26) Robert Harman, November 28-29, 1978 (2)	484
[Associate Director, Governmental Relations, NEA]	
(27) Susan Lowell, December 6-7, 1978 (2)	588
[Director, Communications, NEA]	
(28) James Harris, December 8, 1978 (1)	68
[Past-President, NEA]	
(29) Susan Zagrabelny, November 17, 1978 (1)	180
[Director, Northeast UniServ Unit, MEA]	

NON-PARTY

Jack Henry Brebbia, (1)	
[Campaign Staff—Jimmy Carter]	
Richard Hutcheson, (1)	28
[Campaign Staff—Jimmy Carter]	
Jeffrey Saunders, November 30, 1978 (1)	128
[Private Investigator]	
Frank Crumbley, November 30, 1978 (1)	77
[Private Investigator]	
Eric Scott Royce, December 27, 1978 (1)	126
Dr. Craig Schneier, December 28-29, 1978 (2)	425
Alice Morton, December 29, 1978 (1)	84
[Archivist, NEA]	
Matthew Reese, January 12 & 19, 1979 (2)	
[Public Relations Consultant to NEA]	

As the above list demonstrates, discovery has been exhaustive and complete. The assertions in plaintiffs' brief that defendants have somehow unilaterally restricted the scope of discovery are absolutely unfounded. Any restriction of discovery has come only with the consent of plaintiffs' counsel following Rule 5 meetings. This is amply demonstrated by the

fact that during the entire period of active discovery spanning approximately two and one-half years, plaintiffs have never served upon this Court or raised to the Court's attention any refusal by defendants to answer any particular interrogatory or document demand to their complete satisfaction, save the instant motion.

Plaintiffs' suggestion that they were saving up their "complaints" until the day before the discovery deadline is a convenient reconstruction of history. In fact, even when presented with the opportunity at a late stage of discovery, plaintiffs' counsel did not relate to the Court any concerns regarding the inadequacy of plaintiffs' responses. See October 13, 1978 Pretrial Transcript. In addition, on December 20, 1978, after the completion of all discovery, save the depositions of Alice Morton and Matthew Reese, plaintiffs failed to relate any discovery problems to Magistrate Renner even though discovery matters were argued before him that day.

III. Plaintiffs' Request to Reopen Discovery Must Be Denied as the Allegations of Discovery Irregularities Are an Absolute Falsehood or Pure Argument Not Related to the Discovery of Facts.

At the October 13, 1978 pretrial, the major question before the Court was the completion of discovery and the methods by which the Court might address the factual issues which will be presented by the parties. During the pretrial the following colloquys occurred:

1. Following the Court's inquiry as to what remained to be discovered, Mr. Vieira responded:

"Now as this summary prepared by Mr. Miller recounts, we have been since early in 1977, conducting depositions of various individuals who fulfilled leadership roles in the NEA, MEA and MCCFA: their political action com-

mittees and so on. We have conducted 17 depositions, we have two that are scheduled for next week.

"The defendants have also produced, as this document recounts, quite a bit of materials that we are now analyzing and putting into form. We think we are getting just about to the end of what we consider is necessary to the presentation of the case . . .

. . .

"Our plan is a very simple one, it is a straight-forward one, as soon as we have finished with Baker and McFarland next week we have at present a list of four or six people, at most six, that we would want to call to finish up the depositions.

"As Mr. Miller has suggested here in this summary, there are some documents, six requests for the production of documents that the NEA and MEA have yet to produce. We think we will have another couple of pages of document requests, especially after we have heard from McFarland and Baker.

"After that, as far as we are concerned, we think we will have adduced all the evidence that we believe is necessary to prove the contentions that we have made." October 13 Pretrial Transcript pp. 4-6.

2. In response to the Court's request regarding the amount of time necessary to complete the remaining discovery, Mr. Vieira stated:

". . . we ought to be able to get it done, if we really push it, by early December-mid-December. After that it is a matter of preparing a record and drawing up a motion. We have been doing that as we have been going along.

The Court: From your standpoint we will complete all discovery by the 31st of December?

Mr. Vieira: I think we can do that." October 13 Pre-trial Transcript p. 10.

Subsequent to the pretrial conference, defendants cooperated in additional discovery far in excess of that outlined by plaintiffs' counsel at the pretrial. In all, fifteen depositions have been taken subsequent to October 13, ten of which were of employees or officers of the defendants. Moreover, a great volume of documents was produced during this period in an attempt to assist plaintiffs in completing discovery. In spite of this effort and repeated assurances made during the October 13, 1978 pretrial hearing, Mr. Vieira now glibly asserts that plaintiffs chose to "postpone any revelations to the Court, in the hope that defendants might at last cooperate in the development of the record of this case." Pl. Mem. 82.

Plaintiffs' admissions that they have "amassed" facts and "documented" their claims. (see, Pl. Mem. 45, 76 and 80), is basis, in and of itself, for dismissing their motion. However, not to go unrecognized is their obvious determination to ignore the Rule 37 procedure by which alleged failures to respond can be brought to the attention of the parties and the Court. Other courts, without respect to the merits of the motions to compel, have held that postponing "relevations" is totally inappropriate under the Federal Rules of Civil Procedure.

In *Zurzola v. General Motors Corp.*, 22 FRServ. 2d 1029 (E.D. Pa. 1975) the court noted that counsel for plaintiff failed to mention the discovery problems at pretrial conferences before the Court and hearings before the Magistrate:

"The record reveals that on September 13, 1973, counsel for plaintiff attended a pretrial conference before the Honorable Thomas A. Masterson, then of this court, and did not mention the unanswered interrogatories. Judge

Masterson's subsequent pretrial order indicated that discovery was completed. On September 19, 1974, plaintiff's counsel appeared at a status call of this court, but did not refer to the unanswered interrogatories. Neither did plaintiff's proposed final pretrial order, filed on October 3, 1974. On January 29, 1975, United States Magistrate Richard A. Powers, III, conducted a pretrial conference in this action and his subsequent pretrial report, like Judge Masterson's, stated that discovery was complete.

* * *

"This record shows plainly that for a period of more than 18 months, in numerous appearances and pleadings before this court, plaintiff never once raised the issue of the unanswered interrogatories and never once suggested that discovery was not complete."

In *Price v. Maryland Casualty Co.*, 561 F.2d 609, 611 (5th Cir. 1977) the appeals court affirmed the trial court's ruling denying plaintiff's motion to compel discovery stating:

"At no time before the expiration of discovery did Price's counsel move . . . to compel responsive answers from any deponent who had refused to answer any questions. . . . Noting that plaintiff had been inexcusably dilatory in pursuing discovery . . . the district court denied plaintiff's motion. . . . While Fed. R. Civ. P. 37(a) does not specify a time limit in which procedures to compel discovery must be undertaken, courts interpreting that Rule have recognized that unreasonable delay can result in a waiver of a party's right to avail himself of the rule."

See also, *Butkowski v. General Motors Corp.*, 497 F.2d 1158 (2nd Cir. 1974).

While defendants' opposition to the motion to reopen discovery is based primarily on the fact that plaintiffs have

secured all discovery requested and that additional discovery is totally unnecessary, the failure to request any court assistance in a timely fashion is further reason to deny their motion.

A. Plaintiffs' Allegation That Defendants Have Failed to Properly Respond to Their Requests for Admission Is Unmeritorious.

As the affidavit of Eric R. Miller sets forth, counsel for both parties met in lengthy sessions regarding the requests for admission and the methods by which specific requests could be modified to comport with the facts. As a result of these sessions, defendants either admitted, qualified or denied, each of the 381 requests. The responses were served on March 31, 1978. Plaintiffs did nothing with respect to the claimed inadequacy of those responses until nine months later on the eve of the discovery deadline.¹ In fact, the responses were discussed at the October 13, 1978 pretrial wherein Mr. Vieira stated:

"We presented the defendants with 300 or so requests to admit certain facts and they admitted some and they denied others and we had conferences with them over the various types of language that we wanted or they wanted.

¹ In *Anco Engineering Co. v. Bud Radio, Inc.*, 8 FR Serv. 2d 37a.12, Case 1, the Court in a similar setting ruled:

"The defendant filed on October 8, 1962 a second set of interrogatories. These were answered by the plaintiff on November 16, 1962. On August 19, 1963, the defendant filed a motion to compel further answers to 17 of these interrogatories. . . .

"I am of the opinion that the orderly administration of justice requires that a motion such as this must be filed within a reasonable time. Here the defendant has filed its motion to compel further answers to interrogatories *nine months* after the interrogatories were answered by the plaintiff. The basis for the motion is that the answers are evasive and incomplete. This motion could have been filed promptly so as not to further delay the date when this case would be tried.

"Therefore, the motion will be denied on the basis that under the facts peculiar to this case it was not filed within a reasonable time." (Emphasis added).

Sometimes we compromised; sometimes they did; sometimes neither of us did." October 13 Pretrial Transcript p. 7.

Plaintiffs cannot now assert, after possessing the responses for nine months, that these responses somehow now support a massive reopening of discovery.

It would take days to explain the response to each of the 381 requests. Twenty-nine were admitted as written, 186 were partially admitted, 166 were denied. Responses to particular requests came after detailed review by clients and defendants' counsel, consisting of an analysis of (1) the terms as defined in the request, (2) the actual language of the request itself, and (3) a comparison of the language to the facts.

Initially, the scope of the definitions set forth in the requests posed an almost insurmountable hurdle. Two definitions are provided as examples:

"Lobby" or "lobbying" means any activity the purpose of which is to influence *directly* or *indirectly*, the action of any government official, whether elected or appointed and includes any contact, direct or indirect, with any such official by any official staff person, member, or agent of NEA, MEA, MCCFA, NEA-PAC, IMPACE, or UniServ. "NEA organization" means NEA, its local and state affiliates, NEA-PAC and all analogous political-action committees of local and state NEA affiliates, and UniServ—and specifically includes MCCFA, MEA, IMPACE, and Minnesota UniServ.

As far as could be determined under the definitions provided, lobbying included any indirect contact with any government official, elected or appointed. Under that definition, voting constitutes lobbying. The definition of "NEA" organization" included literally hundreds of separate entities lumped together as if each were a mirror image of the other.

A sample of certain requests included within plaintiffs' brief demonstrates the obvious basis for the denials. For example, plaintiffs complain about the refusal to admit a number of requests which incorporate Request No. 42 by reference. Request No. 42 includes a lead-in clause and five separate sub-parts, too lengthy to repeat here, which state in essence that it is a fact that teacher organizations must control the legislature, the executive branch, all administrative agents, and the courts in order to collectively bargain successfully, and are willing to utilize any and all means at their disposal to attain that success. The request is simply untrue.

Another example is Request No. 41 which is reproduced here, with certain portions of the request underlined to highlight why it was denied.

"Request No. 41. The *success* of the NEA organization's legislative program *requires* that the NEA and its state and local affiliates exert the *maximum possible political influence* over the legislative, executive, and judicial branches of the state and federal governments: namely, insofar as it is possible, *directly controlling the composition of State legislatures and Congress*, and the identity of state governors and the President of the United States, through intervention and participation in partisan-political campaigns of candidates for election to public office; and *indirectly controlling the composition of the state and federal courts* through the exercise of influence or control over executive appointments and legislative confirmations."

A number of other requests were denied because they incorporated sub-parts of either Request No. 42 or very similar Request No. 57. See, Request No. 46, Request No. 60, Request No. 61, Request No. 62 which are listed on pages 56, 58, 59 and 60 of Plaintiffs' Memorandum respectively.

A similar examination of each particular request and response could be made, however, we do not believe that effort is warranted, particularly in light of plaintiffs' admission that defendants' responses to the requests to admit are "typical of their attitude throughout this case: namely, admit the bare facts that something was done or said by UTP, but denies its obvious significance." Pl. Mem. 94.

Defendants do not intend to admit to plaintiffs' opening and closing arguments. Defendants have admitted the "bare facts".

B. Plaintiffs' Allegation That Defendants Have Not Produced All Documents As Requested Is Totally Unsubstantiated.

Discovery requests relating to the specific correspondence files were uniformly limited, per Rule 5 meetings, to each person's specified correspondence files, provided the files were separately maintained. See affidavit of Eric R. Miller. This agreement was necessitated by the fact that certain deponents did not maintain separate correspondence files, but rather, filed all correspondence in the file to which the correspondence related. In order to fully and completely locate all such correspondence it would require the commitment of many person hours. It was agreed by plaintiffs' counsel that this effort was not necessary and that any correspondence request would be limited to identifiable correspondence files segregated from other files.

The scope of the requested discovery and the resolution is readily understandable to any person who has practiced law. Some attorneys keep "day files" of all of their correspondence which are maintained separately. Such a day file is easily locatable and easily produced. However, in the absence of such a file, the production of all correspondence ever authored or re-

ceived by an attorney would require the review of virtually hundreds of files. The same was true with respect to a number of deponents in this case. Such an effort was not required or expected by plaintiffs and all segregated correspondence files were produced per agreement. In addition, numerous individually requested documents and subject matter files from departments and individuals having a working relationship with deponents were produced and consisted of many documents authored or received by the deponent.

The plaintiffs also claim that the defendant deponents failed to participate in the identification of their correspondence files for purposes of production prior to their depositions. However, the transcript quotations cited by the plaintiffs uniformly confirm that each deponent's secretary or administrative assistant worked with defendants' counsel in identifying and collecting the requested documents. Pl. Mem. 155, 157, 157-58 and 164. In the case of Rosalyn Baker, she was not asked if her secretary was involved and Alice Morton specifically directed defendants' counsel to the documents which were responsive to the plaintiffs' request. Pl. Mem. 161. It is typical in the real world for a secretary or administrative assistant to be more knowledgeable about the files and filing system and several of the deponents indicated this during their testimony.

Plaintiffs assert that only a portion of certain files have been produced and that the balance of these files were improperly withheld by defendants. The plaintiffs support this allegation by assuming how many drawers are in a file cabinet (Pl. Mem. 165), assuming that *all* of the documents contained in an *estimated* number of file drawers were responsive to the plaintiffs' request (Pl. Mem. 167, 168 and 169) when in fact the plaintiffs' requests were limited to the time frame of 1971

to the present and did not include all of the types of documents maintained by the deponents.

The plaintiffs also conveniently failed to disclose in conjunction with their allegations concerning the files of Ken Bresin (Pl. Mem. 166-67) the specific agreement arrived at in a Local Rule 5 meeting of counsel that since Mr. Bresin did not maintain a correspondence file there would be no documents produced prior to his deposition. (See, Affidavit of Eric R. Miller and Exhibit K attached thereto).

The plaintiffs allege that documents concerning Project 18 and the Youth Franchise Coalition were improperly withheld in conjunction with the deposition of Alice Morton. Pl. Mem. 186-87. However, a review of the exhibits to Plaintiffs' Memorandum (Exhibits No. 246 and 247) clearly indicates that these activities were solely in regard to gaining the right to vote for 18 year old citizens and, therefore, were not relevant to the scope of the subpoena duces tecum which covered only documents concerning the political campaigns of candidates for public office. Pl. Mem. 149.

Finally, the plaintiffs, apparently seriously rely on their observations that one file folder was "turned in the opposite direction from the other file folders" and that a document "was torn in the corner" to support the allegation that documents have been withheld. Pl. Mem. 174-75. Such observations serve only to reflect the delusions of the crusade in which plaintiffs' counsel participate.

It must again be stated that the vast majority of document production was accomplished prior to the October 13, 1978 pretrial conference and the plaintiffs in no manner indicated dissatisfaction to defendants' counsel or the Court. Plaintiffs again had the opportunity to express their concern in the hearing before Magistrate Renner on December 20, 1978, by which

time all of the depositions and the related production of documents had been completed except for Alice Morton and Matthew Reese and yet the plaintiffs raised no objection.

C. Plaintiffs' Ambitions to Redepose Certain Witnesses, and to Depose Additional Persons Are Unjustified.²

The crux of plaintiffs' request to redepose a large number of witnesses rests upon their belief that they, rather than the Court, are entitled to rule on the credibility of a particular witness or the weight to be given to a witness' testimony. The short answer to plaintiffs' contention is obvious: plaintiffs may impeach any witness they desire from the wealth of material at their hand.

It is submitted, however, that plaintiffs' will not be as successful at impeachment as the length of their one hundred-plus page argument on this subject might (without reading) suggest. A cursory examination of its pages reveals numerous flaws in plaintiffs' analysis of the testimony. It is not appropriate or necessary to provide the Court with an item by item refutation of plaintiffs' argument. What follows is a summary, supported by selected examples from plaintiffs' brief, of the

² When faced with a similar argument in *United States v. DeVincentis*, 30 FRD 71 (E.D. Pa. 1962) the court stated:

"[1] Plaintiff . . . asks the Court to direct the witnesses named to answer specific questions, and, in addition, to answer general questions on depositions, they having previously appeared and been examined extensively on the issues involved in the case. Plaintiff has not shown us in his argument or brief any authority for the taking of general depositions under the provisions of Rule 37 . . .

* * *

"The issue as we see it is whether the defendant now, in the light of the former depositions, interrogatories and admissions, should be compelled to again produce the witnesses for either general depositions or compelling answers to specific questions. In our opinion, to direct them to do so would constitute harassment and an undue burden on the defendant without justification for the reasons above set forth."

fundamental errors in plaintiffs' approach to the testimony taken in this case.

In the introductory portion of their brief, plaintiffs note that their theory in this case views the MEA, NEA, IMPACE, etc., as a single, "integrated" organization "UTP". A reading of the entire brief provides a greater understanding of plaintiffs' view of these organizations: defendants are a highly centralized, well-oiled machine relentlessly plotting the political destiny of the nation. Where a witness' testimony suggests a lesser degree of organizational efficiency or formality, plaintiffs charge the witness with lying. Where witnesses such as Messrs. Bresin and VanderWoude testify to their work in a political campaign, they are charged with telling the truth only because defendants "feared that plaintiffs knew something" (Pl. Mem. 266) or because a "last-minute arrival", (Pl. Mem. 235) allowed inadequate time for fabricating the complex web of lies imagined by plaintiffs. It is all part of "the conspiracy". Given plaintiffs' unyielding dedication to this perception of defendants, Mr. Vieira's comment during the McFarland deposition is appropriate: "We live in different worlds." (Pl. Mem. 199.)

As an example, plaintiffs dwell on the existence or non-existence of "evaluations of the involvement of UTP members in the Carter-Mondale campaign." Pl. Mem. 237-42. The testimony of Harman, McFarland, Lowell, Weissman and VanderWoude is consistent with the fact of some informal discussion, from time to time, concerning the status of this activity. Plaintiffs' perception of defendants, however, prevents their acceptance of anything short of a formalized, chain-of-command reporting procedure. A similar fallacy exists in plaintiffs' discussion of post-election "reports". Pl.

Mem. 242-46. Because witnesses do not testify to such a system, plaintiffs charge them with lying.

Plaintiffs' perceptions of defendant organizations extend to the abilities attributed to staff personnel: persons deposed are imagined to have computer-like recall of broad sets of facts. Mr. McFarland must be lying because he cannot remember a two-year old telex. Pl. Mem. 198-99. Mr. Harris must be lying because he cannot recall a four-year old document. And counsel for plaintiffs seem more concerned with "establishing" the "fact" of the lien than obtaining substantive information, because he refuses to show Harris a document which might refresh his memory:

"Mr. Goodwin: If you want to show us the NEA document—

Mr. Vieira: No. You are not going to see this document. This is going into the Court along with a number of others. We won't bother to show you everything we have. We will let you sink deeper and deeper into the quicksand.

Mr. Goodwin: So I understand—You are reading from a document and asking questions about the document to the witness. Is that correct?

Mr. Vieira: No. It is not correct. I don't intend to answer any more questions." Pl. Mem. 198.

Further, plaintiffs suppose staff personnel to recall with special detail matters believed to be relevant to plaintiffs' case. Mr. McFarland must be lying because he has no detailed recollection of an alleged "program" of UniServ campaign participation "which should have impressed almost anyone who learned of it". Pl. Mem. 236. Matters viewed as "impressive" to those dedicated to plaintiffs' cause, of course, are not universally so perceived.

Plaintiffs' use of language is pervaded by their ideological position (as is evidenced in their Rule 36 requests). In addition, while plaintiffs are unwilling to forgive any imprecision in wording used by defendants (it is all part of "the conspiracy"), they purport to demonstrate contradictions through changing the meaning of terms. For example, plaintiffs make much of Mr. Mammenga's statement that he was not a "volunteer" of any particular candidate campaign. Pl. Mem. 219-22. Plaintiffs fail to note that earlier in that deposition, plaintiffs' counsel defined the "volunteer" as being one of two things: a political organizer "who would come in and help me set up a campaign," or a person who "would do the nuts and bolts duties in terms of sitting at the telephone banks". Mammenga Depo. p. 220-221. Understood in this fashion (and without arguing the fact of this explanation), Mammenga's testimony is not inconsistent with subsequent statements cited by plaintiffs indicating that Mammenga may have had some contact with the Carter-Mondale campaign. Moreover, in attempting to establish the attempted "conspiracy", plaintiffs went so far as to depose members of the White House staff. Despite extensive questioning these officials knew nothing of any participation by Mr. Mammenga in the campaign.

Similarly, plaintiffs frequently purport to "impeach" a witness by quoting a statement dealing with a different subject. For example, Ms. Lowell's lack of recollection concerning solicitation of campaign workers by staff is "contradicted" by her later statement concerning actual campaigning by teachers, which is supposedly "inconsistent" with Mr. Harman's lack of recollection that certain types of staff were "loaned" to Carter-Mondale campaign. Pl. Mem. 225-27.

Such is the substance of plaintiffs' supposed conspiracy. However, one is inclined not to doubt plaintiffs' sincerity. Plaintiffs' response to the "conspiracy" has been a counter-

attack wherein a small army of private investigators was sent to Minnesota to surreptitiously observe and question personnel connected with defendants. The ethical propriety of this activity is addressed in a separate motion. Plaintiffs rely on reports received from these investigators to suggest further lying. Pl. Mem. 259-97. Assuming *arguendo* the truth of Investigator Saunders' reports, the significance of any inaccuracies in Messrs. Bresin's and VanderWoude's testimony are less than startling. How many evenings were Bresin and VanderWoude at the Fraser phone bank—two or three? Did VanderWoude look up names in a telephone directory on the evenings in question or didn't he? Is Bresin's failure to work on an official basis for Fraser explained by an MEA policy or by advice from NEA attorneys? It is difficult to see how the alternatives presented by this last question are inconsistent, let alone proof of some "conspiracy". In all cases, any inconsistency is trivial and in the final analysis is for the Court to weigh.

Plaintiffs have enjoyed massive discovery in this case. Depositions have included numerous people within the defendant organizations. In addition plaintiffs have deposed individuals outside the organization—including members of the White House staff. Plaintiffs have the tools to impeach testimony they believe to be untrue to the extent those tools exist and the testimony is impeachable.

It is clear that plaintiffs don't like much of what they hear. Additional depositions and redepositions must not be ordered, however, simply because discovery has not established defendant organizations as the type of entity which plaintiffs believe them to be.

CONCLUSION

It is obvious from reading Plaintiffs' Memorandum that the ideological view point of plaintiffs has prevented their objectively considering the scope of discovery. A cursory reading of the 296 page Memorandum, if not the length of it alone, demonstrates the extensive lengths to which the plaintiffs will proceed in attempting to prosecute their case. While defendants do not begrudge them the opportunity to present their viewpoints to the Court and to adequately discover all facts which relate to those viewpoints, the discovery produced comprehensively responds to all requests they have made.³

Defendants respectfully request the Court to refuse to modify its October Order terminating discovery as of December 31, 1978. Plaintiffs have had complete and thorough discovery. Not once throughout the course of discovery, save the filing of this motion, have plaintiffs come to the Court complaining of unfair restrictions on discovery by defendants. Further, during the October 13, 1978 pretrial, defendants' counsel represented to the Court that it would complete discovery by mid-December, 1978, and that the December 31, 1978 discovery deadline was totally compatible with their needs. No basis exists to reopen discovery along the lines suggested by plaintiffs particularly where,⁴ as here, plaintiffs

³ If anyone has legitimate grounds for complaint concerning discovery, it is defendants. Despite the modest nature of defendants' discovery attempts, plaintiffs have failed to respond to defendants' outstanding interrogatories.

⁴ The *Seay v. McDonnell Douglas Corp.* cases cited on pp. 323-25 of Plaintiffs' Memorandum as authority supporting their motion to reopen discovery do not even address discovery issues. The unpublished *Seay* opinion attached to plaintiffs' affidavit A-15 only requires production of documents which were produced long ago in this case.

have consciously chosen not to bring their "relevations" to the attention of the parties or the Court in a timely fashion.

OPPENHEIMER, WOLFF,
FOSTER, SHEPARD
AND DONNELLY

By Eric R. Miller
Keith E. Goodwin
Donald W. Selzer, Jr.
1700 First National
Bank Building
St. Paul, Minnesota 55101

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civ. No. 4-74-69

LEON W. KNIGHT, et al.,

Plaintiffs,

vs.

MINNESOTA COMMUNITY COLLEGE FACULTY
ASSOCIATION, et al.,

Defendants.

AFFIDAVIT OF ERIC R. MILLER

State of Minnesota
County of Ramsey—ss.

ERIC R. MILLER, being first duly sworn, states and alleges
as follows:

1. He has been one of the defendant employee organizations' attorneys of record since the initiation of this litigation.

2. He did personally review all of the Interrogatories and Requests for Production of Documents when served by the plaintiffs on the defendants.

3. He participated in all of the meetings conducted under Rule 5 of the Local Rules of Practice for the United States District Court for the District of Minnesota in regard to the plaintiffs' Interrogatories and Requests for Production of Documents.

4. At least one Local Rule 5 meeting was conducted in regard to each set of plaintiffs' Interrogatories and each of the plaintiffs' Requests for Production of Documents and that many of these meetings were one full working day in length.

5. During the Local Rule 5 meetings defendants' counsel explained on many occasions the difficulties they had with the plaintiffs' discovery requests in light of their broad scope, uncertain language and the size and complexity of the defendant employee organizations, particularly the National Education Association.

6. Plaintiffs' counsel frequently indicated agreement to narrowing the scope of their Requests for Documents or eliminating certain portions of the requests entirely during the local Rule 5 meetings.

7. Substantial correspondence was generated by counsel for plaintiffs and defendants describing the agreements reached in the Local Rule 5 meetings concerning the documents to be produced by the defendants in response to the plaintiffs' Interrogatories and Requests for Documents. A small sample of this correspondence is attached hereto as Exhibits A through L.

8. Defendants' counsel, on several occasions, explained to plaintiffs' counsel that many of the defendants' officers and employees did not retain in their own files many of the documents they prepared or received but rather the documents were provided to another persons for their files or filed in a departmental file. Plaintiffs' counsel specifically expressed understanding and agreement that the defendants would be unable to identify and collect every document authored or received by certain officers and employees of the defendants over the more than 7 year time period covered by the litigation.

9. Specifically in regard to the files of certain officers and employees of defendants who were to be deposed by the plaintiffs it was understood and agreed to be plaintiffs' counsel that the defendants would not be responsible for identifying and collecting every document authored or received by each such deponent but rather produce only the correspondence specifically filed or designated as correspondence. This understanding is exemplified by the letter of William Mullin dated November 7, 1978, and attached as Exhibit K.

10. In addition to the correspondence files of each deponent numerous individually identified documents and subject matter files from related departments were produced which contained extensive documentation prepared or received by the respective deponent.

11. It is believed that virtually every individual paragraph of every request for the production of documents served by the plaintiffs was reviewed and resolved during the many Local Rule 5 meetings.

12. At no time during the Local Rule 5 meetings or subsequent to the actual production of the agreed upon documents

did plaintiffs' counsel indicate objection to the agreements reached or the documents produced.

13. Upon receipt of the plaintiffs' requests for admission a series of extensive meetings between counsel for plaintiffs and defendants were conducted and consumed at least 7 full working days. (See report of counsel to the Court dated and attached as Exhibit M.) These meetings were conducted under the spirit of Local Rule 5.

14. The purpose of these meetings were to clarify the language, scope and intent of many of the requests for admission. Counsel for the parties each re-drafted many of the requests as a result of the meetings and these revisions were reviewed in additional subsequent meetings.

15. Plaintiffs' counsel ultimately decided to revert to the original requests for admission with few exceptions and the defendants provided responses to them.

ERIC R. MILLER

Subscribed and sworn to before me this 26th day of January, 1979. Mariann Marcus, Notary Public, Ramsey County, Minnesota. My Commission Expires July 30, 1985.

EXHIBIT A

Letterhead
LAW OFFICES
MULLIN, WEINBERG & DALY, P.A.

MEMORANDUM

To: Eric R. Miller, Esq.; Keith E. Goodwin, Esq.
Oppenheimer, Wolff, Foster, Shepard and Donnelly
W-1781 First National Bank Building
Saint Paul, Minnesota 55101

From: William E. Mullin

Date: July 29, 1976

Re: Leon Knight, et al. vs. Minnesota Community
College Faculty Association, et al.
Civil 4-74-659
Our File Number 2447

This is to confirm the agreements reached in our recent meetings covering your objections to plaintiffs' interrogatories.

You will provide (or, where indicated, are considering providing) the following information in response to plaintiffs' interrogatories. This memo discusses first the plaintiffs' Second Set of Interrogatories and secondly, the plaintiffs' First Set of Interrogatories, since this was the order of our discussion.

PLAINTIFFS' SECOND SET OF INTERROGATORIES:

Interrogatory No. 1. You will provide the public filings of IMPACE. You will advise whether you will consider providing information concerning the activity of employees of IMPACE. You will consider providing records of MEA, NEA and MCCFA support of candidates, and information concern-

ing support of candidates by MEA, NEA and MCCFA employees in the scope of their employment, but limited to senior staff.

Interrogatory No. 2. You will consider providing documents relating to orders or directions given to officers, directors or senior staff of MEA, NEA, MCCFA, and all employees of IMPACE, to support candidates or advocate positions concerning public affairs, including but not limited to public educational policy. You will supply documentation of MEA and MCCFA endorsements of candidates as well as endorsement of positions taken by MEA and MCCFA in public affairs matters.

You will consider supplying information concerning activity by the MEA, NEA, MCCFA, or IMPACE organizations on behalf of candidates or positions concerning public affairs (e.g., mailings to members and officers, memoranda to members and officers requesting them to "spread the word" on a particular candidate or issue, requests from a parent body asking local bodies to adopt resolutions concerning a particular candidate or issue).

You will consider supplying information concerning activity of officers and directors and senior staff of MEA and NEA in the scope of their employment, concerning advocacy of positions of one organization on issues.

Interrogatory Nos. 3 and 4. You will supply copies of the publicly-filed reports of all MEA, NEA, MCCFA and IMPACE lobbyists in Minnesota.

You will supply copies of written reports made by all of these registered lobbyists to the Boards of Directors, executive committees or officers of MEA, NEA, MCCFA and IMPACE, and minutes of meetings where oral reports were recorded.

Interrogatory No. 5. You will consider supplying copies of the expense accounts of the registered lobbyists. (I also understand that the financial statements of the various organizations will provide some information concerning the amount of money spent on lobbying.)

Interrogatory No. 6. You will provide us with an answer which states, in essence, that the registered lobbyists' offices at the MEA building uses MEA secretaries and make use of MEA office facilities with respect to all lobbying activity carried out by them, and that NEA lobbyists use NEA personnel and facilities in the same manner.

Interrogatory Nos. 7 and 8. You will disclose in general terms the training programs, seminars, and workshops conducted by the defendant organizations to develop lobbying skills. You are considering turning over the files of MEA, NEA, MCCFA or IMPACE containing the material distributed at such training programs, seminars, or workshops. You are also considering telling us the form in which these files are kept, and giving us access to these files.

You will describe in a general way the programs on lobbying and public advocacy which have been attended by MEA, NEA, MCCFA and IMPACE personnel. (The lobbyists' expense accounts may show some of this information.)

Interrogatory No. 9. You advise that some of the documents supplied in answer to other interrogatories will, in part, provide the documents whose identification is called for in Interrogatory No. 9.

Interrogatory No. 10. You will supply financial statements and budgets of MEA, NEA, MCCFA and IMPACE. You will consider supplying further documentation on segregation in MCCFA between expenses for activities classified as "negotiations and administration of grievance procedures" and expenses for activities not so classified.

Interrogatory No. 11. After the budget materials referred to herein under Interrogatory No. 10 have been supplied, you will discuss further what, if any, information will be supplied.

PLAINTIFFS' FIRST SET OF INTERROGATORIES:

Interrogatory No. 1(a). This interrogatory is not objected to.

Interrogatory No. 1(b). You will identify the directors, officers and senior staff of MEA, NEA and MCCFA, and all of the employees of IMPACE.

Interrogatory Nos. 1(c) and 1(d). No information will be supplied except that you advise that budgets and financial statements (see above under Second Set of Interrogatories, Interrogatory Nos. 10 and 11) may provide some of the information called for in this interrogatory.

Interrogatory Nos. 1(e) through 1(g). No information will be supplied, at least for the present.

Interrogatory No. 1(h). Organizational charts will be supplied for MEA, NEA and MCCFA and IMPACE, together with charts indicating the committees of these organizations, or a description of the functions and responsibilities of the committees.

Interrogatory No. 1(i). You advise that the organizational charts to be supplied under Interrogatory 1(h) will, in part, be responsive to this interrogatory.

Interrogatory No. 1(j). You advise that the organizational charts to be supplied will, in part, be responsive to this interrogatory.

Interrogatory No. 2(a). This interrogatory is not objected to. You will supply copies of the constitutions, charters, by-laws, rules and regulations of MEA, NEA, MCCFA and IMPACE, together with minutes of board of directors meetings and committee meetings of these organizations. You will

advise whether there are executive committee minutes which are in existence for these organizations, and whether these materials will be supplied.

Interrogatory No. 2(b). See statements under Interrogatory 2(a) above.

Interrogatory No. 2(c). The requested synopses and resumes will not be provided. However, you advise that some of the material to be supplied under other interrogatories may be responsive to the subject matters covered in Interrogatory 2(c). In addition, rules, regulations, and statements of policy of IMPACE, MEA, NEA and MCCFA with respect to the subject matters covered in Interrogatory 2(c) will be supplied, including rules for authorizing expenditures.

Interrogatory Nos. 2(d) (1) and (2). These interrogatories are not objected to.

Interrogatory No. 2(d) (3). This interrogatory will not be answered.

Interrogatory No. 2(d) (4). You advise that this interrogatory will be answered, in part by documents supplied in response to other interrogatories.

Interrogatory No. 3(a). The information called for by this interrogatory will be provided.

Interrogatory No. 3(b). This information will be provided.

Interrogatory No. 3(c). This information will be provided.

Interrogatory No. 3(d). You will state how the amount of the initiation fees and dues and other fees are determined, and the name of the person responsible.

Interrogatory No. 3(e). The information called for by this interrogatory will not be supplied.

Interrogatory No. 3(f). Documents pertaining to the information provided in response to answer to Interrogatory No. 3(a) through 3(e) will be provided.

Interrogatory No. 4. You have requested further explanation concerning what the interrogatory calls for. Pending such explanation, you are considering supplying, at a minimum, the information called for in Interrogatory Nos. 4(a) and 4(b), except that membership lists will not be supplied.

Interrogatory No. 5. A list of bookkeeping accounts maintained by each organization will be provided, and any records available on how expenditures were classified as within the term "negotiation and administration of grievance procedures," will be provided. (If no such records are available, I assume you will provide me with an answer so advising me.)

Interrogatory No. 6. Memoranda and other records concerning allocation of expenditures into the category "negotiation and administration of grievance procedures" will be supplied.

Interrogatory No. 7. The MCCFA budget, and the name of the person primarily responsible for preparing the budget, will be provided (see above). You will consider providing the same information for MEA, NEA and IMPACE.

Interrogatory No. 8. You will provide, in response to answers to other interrogatories, annual financial statements for MCCFA, MEA, NEA and IMPACE. You will also provide state and federal filings of IMPACE under state and federal campaign laws, and tax returns of each organization.

Interrogatory No. 9. You will furnish documents and information relating to the request for the deduction of fair share fees from wages due the plaintiffs in this action.

Interrogatory No. 10. You will provide financial statements of NEA, MCCFA, MEA and IMPACE. You will provide an answer which shows that IMPACE received no monies or fees from dues or fair share. You will also consider telling us how MCCFA dues are apportioned among various or-

ganizations. You will state what the dues have been, and will consider advising us on how the dues have been apportioned among MCCFA, MEA, NEA and IMPACE.

Interrogatory No. 11. Listings of accounts of NEA and MCCFA will, you advise, help to establish this information. You will list the major functions of each organization, and the amount of money spent for each function by each organization. You will also provide information for each organization as to who receives the monies, who expends the monies, and who makes approvals of expenditures.

Interrogatory No. 12. You will provide a copy of the MEA Board of Directors' resolution authorizing the assessment of fair share fees at 100% of member's dues. You will also supply resolutions of MCCFA, MEA and NEA, and their Boards of Directors with respect to fair share, if such are in existence. You will supply minutes of all meetings where such resolutions were discussed, and staff memoranda to the respective Boards of Directors discussing the assessment of fair share fees.

Interrogatory No. 13. You will supply copies of minutes of MEA, NEA, MCCFA and IMPACE conventions and Boards of Directors in which these bodies are recorded as taking positions on any subject relating to public affairs, including, but not limited to, education policy. You will supply resolutions of the MEA convention, Board of Directors, or MEA Executive Committee, not included in minutes, espousing such positions. You will consider supplying documents of each organization concerning training of lobbyists and activities of each organization in public affairs.

Interrogatory No. 14. If the financial statements to be supplied in response to other interrogatories don't show the

amounts being paid by MCCFA to MEA and NEA and by MEA to NEA, you will consider giving us this information.

Interrogatory No. 15(a). You advise that the financial statements to be supplied will show the amounts called for in this interrogatory.

Interrogatory No. 15(b). You will consider providing copies of agreements between MCCFA and NEA, MCCFA and MEA, MEA and NEA.

Interrogatory No. 15(c). You will consider disclosing the amounts paid under the agreements (if not shown in the financial statements to be supplied).

Interrogatory No. 16. You will give us an answer stating that all fair share fees received by MCCFA are being held in a bank in an escrow account; you will not, however, disclose how much is in the account or the name of the bank where held.

Interrogatory No. 17. See above under answer to Interrogatory No. 16.

Interrogatory No. 18. You will supply the information called for in this interrogatory if readily available. If this information is not supplied, you will advise as to the location and organization of the files of your respective clients where this information is.

Interrogatory No. 19(a). The information called for by Interrogatory No. 19(a) will not be supplied.

Interrogatory No. 19(b). You will supply copies of the MCCFA Green Sheets. You will consider supplying copies of the MEA, Advocate and other notices, information sheets, and other communications sent to plaintiffs.

Interrogatory No. 19(c). You will consider advising what else is done to advise members of the bargaining unit of the matters listed in Interrogatory No. 19(b), other than the steps

disclosed in the documents to be supplied under Interrogatory No. 19(b).

Interrogatory No. 19(d). No information will be provided in response to Interrogatory No. 19(d).

Interrogatory No. 19(e). You will provide the names of arbitrators and fact finders selected and paid by MCCFA.

Interrogatory No. 19(f). You will provide a general statement of the legal fees paid by MCCFA in matters such as challenges to the bargaining unit and "negotiations and administration of grievance procedures."

Interrogatory Nos. 20(a) and 20(b). You will provide us with an answer describing the procedures, if any, which were or are now available by which an employee of the bargaining unit may learn how and for what purposes monies received by MCCFA is spent.

Interrogatory No. 20(c). No information will be supplied.

Interrogatory No. 20(d). This interrogatory will be answered.

Interrogatory No. 20(e). This interrogatory will be answered at a minimum by providing the titles of the persons whose identity is called for the interrogatory.

Interrogatory Nos. 21(a) (1) (a) through 21(a) (1) (h). This interrogatory will not be answered because of objections to the language therein. [As I understand it, the principal objections are to the word "purported" in 21(a) and to the word "union partisans" in 21(a) (1) (h).]

Interrogatory No. 21(a) (2) and No. 21(a) (3). My notes are silent on these interrogatories. Apparently we omitted to discuss them. I would appreciate your letting me know your position on these.

Interrogatory No. 21(b). This interrogatory will be answered in its entirety.

Interrogatory No. 21(c). This interrogatory will be answered.

Interrogatory No. 21(d). This interrogatory will be answered.

Interrogatory Nos. 22(a) through (i). This interrogatory will be answered, but only information regarding the plaintiffs will be supplied.

Interrogatory No. 22 (j). You will advise us as to the form in which your clients keep files in which information might be found to answer this interrogatory.

Interrogatory No. 23. This interrogatory will not be answered.

Interrogatory No. 24. This interrogatory will not be answered.

Interrogatory No. 25. The documents referred to in this interrogatory will be produced.

Interrogatory No. 26(a). You will consider supplying documents which describe the functions and responsibilities of the committees referred to in this interrogatory.

Interrogatory No. 26(b). No information will be supplied.

Interrogatory No. 26(c). No information will be supplied.

Interrogatory No. 27. No information will be supplied.

Interrogatory No. 28. You will provide us with an answer which states that "meet and confer" and "meet and negotiate" meetings have been held between the MCCFA and the Board.

Interrogatory No. 29. You will advise us as to the form in which your clients keep files concerning the grievances.

Interrogatory No. 30. This interrogatory is not objected to and will be answered.

Interrogatory No. 31. This interrogatory will not be answered.

Interrogatory No. 32. This interrogatory is not objected to.

Interrogatory No. 33. You will consider answering this interrogatory, including supplying documents whose identity is called for in Interrogatory No. 33(b) (3) and Interrogatory No. 33(b) (4).

Interrogatory No. 34. This interrogatory will be answered, if the information is readily available.

Interrogatory No. 35. You will consider answering this interrogatory, with the understanding that only the main or principal benefits will be listed.

Interrogatory No. 36. You are considering answering this interrogatory.

Interrogatory No. 37. You have no objection to this interrogatory.

You have indicated that the above information will be supplied for the periods from June 1, 1971 to the present, with the exception that, with respect to lobbying activities, you will acknowledge that MEA lobbied for the enactment of PELRA prior to June 1, 1971. You have indicated that at least some of the information will be supplied without a protective order, and some will not be supplied without a protective order entered either on your motion or by a stipulation. At our next meeting, which I hope will be next week, we will discuss the terms of such a stipulation.

I have indicated that I do not at this point agree that any of the above offerings of information by you constitutes a satisfactory answer to the interrogatories. At this point, no interrogatories have been withdrawn, except that I have agreed that where documents provide the information called for in

an interrogatory, the documents may be supplied, with a clear statement specifying the interrogatory to which documents relate.

After the information referred to above has been supplied, I will advise you as to what additional information is needed. It is hoped that we can eliminate or substantially limit our disagreements by this process.

Thank you for your cooperation in this matter.

WEM/ska

EXHIBIT B

Letterhead

OPPENHEIMER, WOLFF, FOSTER,
SHEPARD AND DONNELLY

August 17, 1976

Mr. William E. Mullin
Mullin, Swirnoff & Weinberg
2200 Dain Tower
Minneapolis, Minnesota 55402
Re: *Knight, et al. v. MCCFA, et al.*
Dear Mr. Mullin:

We are in receipt of your memorandum of July 29 with respect to our recent meetings concerning the plaintiffs' interrogatories and our objections. We have previously indicated to you that at this point we consider that our objections still stand except where they have been expressly withdrawn and that the offering of any information or documents in response to portions of various interrogatories does not mean that we are willing to provide answers or documents in response to the remaining portions of various interrogatories.

Your memorandum indicated that we will provide information or documents commencing with June 1, 1971. This is not

accurate. We indicated that the earliest point in time as to which some of the interrogatories may be relevant would be July 1, 1971 when PELRA became effective. We have also indicated that the earliest possible date for interrogatories relevant to the fair share fee would be July 1, 1973. We did discuss whether or not there had been any "lobbying" in support of the enactment of PELRA, but until that term has been satisfactorily defined and some actual language is proposed concerning any such involvement of my clients, we obviously cannot commit ourselves to any such undefined agreement.

We have provided our comments concerning your analysis of our discussion of each of the interrogatories commencing with the second set and followed by the first set. We should note that we amplified our objections and concerns with respect to the definitions in both sets of interrogatories and it is our understanding that the definitions are not considered binding as stated and that you will provide clarification before any extensive answers or documents are produced.

Plaintiffs' Second Set of Interrogatories:

Interrogatory No. 1—We will provide the public filings of IMPACE which are readily available for inspection by the general public. We will advise you whether we will consider providing information concerning the activity of IMPACE employees and we are considering providing any MEA, NEA, or MCCFA records evidencing support of any candidates if indeed any such activity has occurred. You agreed to review the scope and meaning of Interrogatory 1(B).

Interrogatory No. 2—We are in fundamental agreement with your statements concerning this interrogatory except that we continue to be concerned about the scope of the meaning of "public affairs." We are not certain of the meaning of your third paragraph in that it appears to be duplicative of portions of the first two paragraphs.

Interrogatory Nos. 3 and 4—We shall supply the publicly filed reports of all MEA, NEA, MCCFA, and IMPACE lobbyists in Minnesota where such reports are readily available to the general public. We take exception to the second paragraph of your analysis in that we believe we agreed to review the nature and extent of any written reports by registered lobbyists in light to the anticipated burden of such an exercise particularly in regard to the NEA. We presently are reviewing this matter.

Interrogatory No. 5—We are in fundamental agreement with you first sentence but contrary to your second sentence we did not indicate that any annual financial statements would provide separate information concerning the amount of money expended in regard to "lobbying."

Interrogatory No. 6—We indicated that it was our *understanding* that MEA's registered lobbyists utilize portions of the MEA building and staff in conjunction with their activities. We are making an inquiry with respect to this interrogatory as it applies to the NEA.

Interrogatory Nos. 7 and 8—We are in fundamental agreement with your analysis.

Interrogatory No. 9—We are in fundamental agreement with your analysis.

Interrogatory No. 10—We will provide the annual financial statements and budgets for the MEA, NEA, MCCFA, and IMPACE. We indicated our continuing concern with respect to calling for a legal conclusion as well as the definition of "lobbying" which is a specific provision of this interrogatory.

Interrogatory No. 11—We are in fundamental agreement with your analysis.

Plaintiffs' First Set of Interrogatories:

Interrogatory No. 1(a) (b)—This interrogatory has been answered. We shall attempt to identify the directors, officers,

and senior staff for the MEA and the MCCFA. We believe we indicated we would review the nature and extent of such a project with respect to the NEA and advise you accordingly. We do not recall having agreed to provide a list of all IMPACE employees but we will undertake to identify the scope of such a project and advise you.

Interrogatory Nos. 1(c) and (d)—We are in fundamental agreement with your analysis in light of the requirements of these sections.

Interrogatory Nos. 1(e) through (g)—We are in fundamental agreement with your analysis in light of the requirements of these sections.

Interrogatory No. 1(h)—To the extent that organizational charts for the identified organizations are still in existence, we shall provide them.

Interrogatory No. 1(i)—We are in fundamental agreement with your analysis.

Interrogatory No. 1(j)—We are in fundamental agreement with your analysis.

Interrogatory No. 2(a)—We take exception to your comment that we have not objected to this interrogatory. We did indicate that we were willing to produce and have produced the constitutions and bylaws for some of the identified organizations. The balance of the constitutions and bylaws will be produced. We do not believe we agreed to a blanket understanding to produce the minutes for all meetings of the boards of directors and committee meetings of these organizations. Such a project would involve an extensive amount of burden and clearly not all such minutes for all such meetings are relevant to your complaint. We would suggest that upon reviewing the organization charts and other documents to be produced for the identified organizations you indicate whether you are still interested in pursuing these documents and if so for which

organizations and which committees. We are reviewing whether there are executive committees for the identified organizations and whether minutes are maintained.

Interrogatory No. 2(b)—See our comments under Interrogatory 2(a) above.

Interrogatory No. 2(c)—We are in fundamental agreement with your analysis.

Interrogatory Nos. 2(d)(1) and (2)—We shall provide answers to these interrogatories.

Interrogatory No. 2(d)(3)—We shall provide an answer to this interrogatory.

Interrogatory No. 2(d)(4)—We are in fundamental agreement with your analysis.

Interrogatory No. 3(a), (b), and (c)—These interrogatories have been answered.

Interrogatory No. 3(d), (e), and (f)—We are in fundamental agreement with your analysis.

Interrogatory No. 4—We are in fundamental agreement with your analysis.

Interrogatory No. 5—We agreed to provide you with a list of bookkeeping accounts which would include accounts relevant to negotiations and grievance procedures. It was our understanding that you would examine these accounts and we would attempt to determine the extent of the documentation which you want produced, and we would further jointly review the problem.

Interrogatory No. 6—See comments concerning Interrogatory No. 5 above.

Interrogatory No. 7—We are in fundamental agreement with your analysis.

Interrogatory No. 8—We are in fundamental agreement with you analysis except that in light of our willingness to

produce the identified documents we are reviewing the necessity and relevance of producing tax returns. We shall advise you of our position on this latter matter.

Interrogatory No. 9—We are in fundamental agreement with your analysis.

Interrogatory No. 10—We are in fundamental agreement with your analysis except we note we have already provided the dues structure in our answer to Interrogatory 3(b).

Interrogatory No. 11—We agreed to provide a listing of accounts. We do not recall agreeing to provide a narrative of the "major functions" of each organization or the amount of money spent for each such function but would suggest that to a certain extent this information will be reflected in the documents to be produced (financial statements, budgets, and organization charts.)

Interrogatory No. 12—We shall provide a copy of the MEA resolution concerning the assessment of a fair share fee at 100% of regular membership dues. We shall also provide resolutions of the identified organizations concerning fair share if they are in existence. We do not recall agreeing to produce the minutes of all such meetings or staff memoranda concerning fair share fees but rather agreed to consider the identification and production of any such documents.

Interrogatory No. 13—We are again troubled by the scope of this request and the definition of "public affairs" but we will investigate to determine the extent of any such documentation and would suggest that before undertaking to collect and produce it that we further discuss your request on this matter.

Interrogatory No. 14—We are in fundamental agreement with your analysis.

Interrogatory No. 15(a), (b), and (c)—We are in fundamental agreement with your analysis.

Interrogatory No. 16—We shall indicate that all fair share fees received by the MCCFA are being held in an escrow account but we shall not disclose the total amount of such fees for the entire bargaining unit. We were not aware that this interrogatory requested the identification of any such account or bank.

Interrogatory No. 17—See above comments concerning Interrogatory No. 16.

Interrogatory No. 18—We indicated that if readily available we would provide information concerning the total number of employees in the bargaining unit although we continue to assert that any information concerning the entire bargaining unit is irrelevant in view of the identity of the named plaintiffs. We did not agree to produce any of the information requested in sub-parts (b) and (c).

Interrogatory No. 19(a) through (d)—We are in fundamental agreement with your analysis.

Interrogatory No. 19(e)—Our notes indicate that you were to review the necessity of obtaining such information.

Interrogatory No. 19(f)—Our notes indicate that we objected to identifying legal fees paid by the MCCFA as requested.

Interrogatory Nos. 20(a) and (b)—We are in fundamental agreement with your analysis.

Interrogatory Nos. 20(c) and (d)—We are considering answering these interrogatories.

Interrogatory No. 20(e)—We are in fundamental agreement with your analysis.

Interrogatory Nos. 21(a) (1) (A) through 21(a) (1) (H)—We are willing to consider answering this interrogatory once the referenced language problems are resolved.

Interrogatory Nos. 21(a) (2) and (3)—We are willing to consider answering these interrogatories once the above-mentioned language problems are resolved.

Interrogatory Nos. 21(b), (c), and (d)—We have indicated a willingness to answer these interrogatories based upon our tentative understanding that no differentiation of treatment has taken place.

Interrogatory Nos. 22(a) through (i)—Our understanding was that we would inquire as to the feasibility of reviewing the necessary files for this information and advise you appropriately.

Interrogatory No. 22(j)—See comment for the previous portions of Interrogatory No. 22 above.

Interrogatory No. 23—Our objections still stand.

Interrogatory No. 24—Our objections still stand.

Interrogatory No. 25—The collective bargaining contracts will be produced.

Interrogatory No. 26(a), (b) and (c)—We are in fundamental agreement with your analysis.

Interrogatory No. 27—Our objections still stand.

Interrogatory No. 28—We are in fundamental agreement with your analysis.

Interrogatory No. 29—We are in fundamental agreement with your analysis.

Interrogatory No. 30—We have provided an answer.

Interrogatory No. 31—Our objections still stand.

Interrogatory No. 32—We have provided an answer.

Interrogatory No. 33—We are in fundamental agreement with your analysis.

Interrogatory No. 34—We agreed to determine the effort necessary to located any such requested documents as they might pertain to the named plaintiffs.

Interrogatory No. 35—We are in fundamental agreement with your analysis.

Interrogatory No. 36—We are in fundamental agreement with your analysis.

Interrogatory No. 37—We will provide answers.

We hope to provide much of the information relevant to your inquiries concerning many of the interrogatories within the next several weeks, and we also expect to be able to advise you at that time of the date when we will produce the interrogatory answers and documents already agreed upon. We would appreciate hearing from you on the matters you agreed to further review at your earliest convenience.

Depending on the volume of documents involved, document production may have to take place in Washington, D.C. as well as in St. Paul. We shall of course provide you with timely notice of the details associated with any such document productions.

Very truly yours,
OPPENHEIMER, WOLFF,
FOSTER, SHEPARD
AND DONNELLY
By: ERIC R. MILLER

ERM/gm

EXHIBIT C

September 8, 1976

Mr. William E. Mullin
Mullin, Swirnoff & Weinberg
2200 Dain Tower
Minneapolis, Minnesota 55402
Re: *Leon Knight, et al. v. MCCFA, et al.*

Dear Mr. Mullin:

We are in receipt of your letter of September 7, 1976 with respect to certain aspects of the plaintiffs' requested discovery in this action.

The documents we have produced to date and which we are producing today under separate cover are those which we indicated we could readily produce and permit you to make additional decisions on the balance of your outstanding discovery requests. Whether this initial production can be characterized as involving "substantial numbers of documents" is subject to interpretation but we never attempted to place a volume estimate on the documents involved.

Our understanding was that we would produce (1) constitutions, (2) by-laws, (3) annual budgets, and (4) annual financial statements as the initial production. We have already produced the first two categories and today are producing the latter two groups for the NEA, MEA, MCCFA, and IMPACE. We agreed to and presently are assembling the other documents we agreed to produce and are reviewing the balance of the requests you indicated were of primary concern. We hope to advise you soon as to the disposition of these matters.

We are producing the annual budgets and financial statements today pursuant to the recent protective order in this action. We understand paragraph 4 of the order to be based on the plaintiffs' initial proposal that we designate by way

of descriptive categorization those documents which are public or not subject to the protective order. The clear intent being that all documents not designated as public information by the defendants are claimed confidential and subject to the protective order. Consistent with that understanding the following constitutes our "designations" of public information pursuant to paragraph 4 of the protective order:

National Education Association—a) annual budgets; b) annual financial statements

Minnesota Education Association—a) annual budgets

We shall provide you with a statement for the copying cost of these documents under separate subsequent cover.

We trust the above is responsive and satisfactory in view of our extensive discussions on the matter.

Very truly yours,
OPPENHEIMER, WOLFF,
FOSTER, SHEPARD
AND DONNELLY
By: ERIC R. MILLER

ERM/gm

A-74

EXHIBIT D
Letterhead
LAW OFFICES
MULLIN, WEINBERG & DALY, P.A.

January 26, 1977

Eric R. Miller, Esq.
Oppenheimer, Wolff, Foster,
Shepard and Donnelly
W-1781 First National Bank Bldg.
St. Paul, Minnesota 55101
Re: Knight, et al. vs. MCCFA, et al.
Civil Action No. 4-74-659
Our File Number 2447.

Dear Eric:

We have currently reviewed the Board of Directors minutes for MCCFA and IMPACE. I understand that the minutes for MEA will be available shortly. With the exception of the materials discussed on page 2 of this letter, we will accept inspection and copying of the following additional documents in answer to plaintiffs' interrogatories.

1. The written objections and requests for accounting received by MCCFA from the plaintiffs regarding payment of fair share fees referred to in your Answers to Interrogatories, First Set, Interrogatory No. 22.

2. The written reports given orally at the MCCFA board meetings concerning legislative matters referred to in Defendant MCCFA's Answers to Interrogatories, Second Set, Nos. 3 and 4(b), insofar as such reports are not included in full in the actual minutes of the MCCFA board meetings or executive meetings.

3. The files maintained at the MCCFA offices on workshops or training programs referred to in MCCFA's An-

swers to Interrogatories, Second Set, Interrogatory Nos. 1(a) and (b).

4. The notebooks containing materials relating to 1974-1976 political action workshops maintained at the MEA offices, referred to in MEA's Answers to Interrogatories, Second Set, Nos. 7(c) and 8(b).

5. Copies of actual and proposed bills prepared for MEA, NEA, IMPACE and MCCFA by personnel of these organizations or attorneys for these organizations, for or proposed for introduction in either the Minnesota legislature or the United States Congress, during the period from January 1, 1971 through the present.

6. Copies of any press releases issued by MEA, MCCFA, NEA or IMPACE during the period from January 1, 1972 to the present.

7. Except for material previously supplied, copies of all publications sent since January 1, 1971 by NEA, MEA, MCCFA, and IMPACE to their respective members or their officers or offices of their affiliates, including, but not limited to, *NEA Reporter*, *NEA Advocate*, *NEA NOW*, *MEA Advocate*, *Today's Education*, *Window on Legislation*, *VIP Governmental Relations-Briefing Memo*, *Window on the Legislature*, *MCCFA Green Sheet*, *MCCFA News Flashes*. (With respect to these items, we would like to be put on the mailing list for all publications for the duration of this litigation.)

8. Minutes of the NEA Board of Directors and Executive Committee, and delegate assembly meetings from January 1, 1972 to the present, referred to in NEA's Answers to Interrogatories, First Set, 2(a) and (b). We would be glad to inspect these minutes in the NEA offices in Washington.

9. The records of requests from employees in the MCCFA bargaining unit for information on expenditures referred to

in NEA's Answers to Plaintiffs' Interrogatories, First Set, No. 20.

10. "Speaking for Teachers" training materials, including the section on lobbying, referred to in NEA's Answers to Plaintiffs' Interrogatories, Second Set, Nos. 7 and 8.

11. All files of MEA, NEA, MCCFA and IMPACE relating to legislation and legislative affairs in the Minnesota legislature or the Congress of the United States, including, but not limited to, correspondence with members of Congress and members of the Minnesota legislature.

12. Copies of all materials mailed out to member officers of the MEA, MCCFA, NEA or IMPACE concerning legislation and legislative affairs (except those publications covered by paragraph 7 above).

13. Minutes of the respective Boards of Directors and delegate assemblies of MEA, MCCFA, and IMPACE, referred to in MEA's and MCCFA's respective Answers to Interrogatories, First Set, 2(a) and (b).

As for financial information which you left for consultation by the parties—see your Answers to Interrogatories, Second Set, No. 11, I will accept for the present your producing for deposition the person or persons who would know most about apportionment of "fair share" fees paid to MCCFA, and the person or persons who would know most about payments by MCCFA to the other defendants.

By accepting the above documents in answer to Plaintiffs' Interrogatories, we do not waive the discovery of other materials which may be discoverable under Rule 34, Federal Rules of Civil Procedure.

Very truly yours,
William E. Mullin

WEM:ska

cc: Dr. Edwin Vieira

A-77

EXHIBIT E

Letterhead

OPPENHEIMER, WOLFF, FOSTER,
SHEPARD AND DONNELLY

February 3, 1977

Mr. William Mullin

Mullin, Swirnoff & Weinberg

2200 Dain Tower

Minneapolis, Minnesota 55402

Re: Leon Knight, et al. v. MCCFA, et al.

Dear Mr. Mullin:

Attached you will find copies of the MEA Board of Directors' Meeting Minutes for the period July, 1971, to the present. These documents are provided to you pursuant to your request. Following is an enumeration by board meeting date and general subject matter of those portions of the minutes and attachments to the minutes which have been deleted on the basis of irrelevancy or for which a claim of privilege is made.

August 20, 1971—List of MEA members suspended or terminated for delinquent dues (4-page attachment).

November 5-6, 1971—Report of NEA Board of Directors, October 22-24, 1971. (9-page attachment)

May 5-6, 1972—Report of the NEA Directors, May 5, 1972. (6-page attachment)

August 25-26, 1972—Memorandum from Director of membership to the MEA Board of Directors dated August 15, 1972, listing members suspended from membership for non-payment of dues. (12-page attachment)

May 4-5, 1973—Proposed agreement between the inter-faculty organization for Minnesota State Colleges and the Minnesota Education Association and the National Society of Professors of the National Education Association, May, 1973, (6-page attachment)

August 2-3, 1973—Motion made and passed listing names of members whose termination was recommended for delinquent dues (page 8, XXXV)

October 5-6, 1973—Agreement between the School Nurse Organization of Minnesota and the Minnesota Education Association, October 6, 1973 (3-page attachment)

October 5-6, 1973—Report of NEA directors of NEA Board of Directors' Meeting of September 13-16, 1973. (4-page attachment)

October 19, 1973—Motion relating to dispute of MEA with Dr. Glaydon Robbins. (page 3, XIV, paragraph 1)

December 7-8, 1973—Proposed agreement between the Minnesota Association of Paraprofessionals and the Minnesota Education Association, October 12, 1973. (3-page attachment)

December 7-8, 1973—Actions of the NEA Board of Directors, November 16-18, 1973. (6-page attachment)

December 7-8, 1973—Proposed agreement between the University of Minnesota Duluth Faculty Association and the Minnesota Education Association and the National Education Association (5-page attachment)

December 7-8, 1973—Declaration of trusts relating to Economic Services, Inc. (18-page attachment)

February 1-2, 1974—Motion relating to MEA dispute with Dr. G. Robbins. (page 3, XII)

March 27-28, 1974—Report of MEA Board Merger Study Committee, March 27, 1974. (14-page attachment)

June 7-8, 1974—Information report regarding selection of an arbitrator and associated expenses. (page 8, XXIX)

June 7-8, 1974—Listing of billings of individual MEA members (2-page attachment)

- August 6-7, 1974—Report of the June meeting of the NEA Board of Directors (2-page attachment)
- October 4-5, 1974—Report of the NEA Board of Directors meeting: September 20-21, 1974 (2-page attachment)
- December 13-14, 1974—Report of the November meeting of the NEA Board of Directors (2-page attachment)
- February 7-8, 1975—Report of the NEA Midwest Regional Advisory Council held January 24-25, 1975. (2-page attachment)
- June 6-8, 1975—NEA Board of Directors report for the meeting of May 2-4, 1975. (4-page attachment)
- June 6-8, 1975—Midwest Regional Advisory Council report, May 30-31, 1975 (11-page attachment)
- August 8-9, 1975—NEA Board of Directors report, June 30-July 2, 5, 1975. (3-page attachment)
- August 8-9, 1975—State membership project proposal relating to the student Minnesota Education Association. (6-page attachment)
- October 3-4, 1975—Report of NEA Board meeting, September 18-21, 1975. (4-page attachment)
- October 3-4, 1975—Midwest Region meeting report (2-page attachment)
- October 3-4, 1975—Agreement between Mid-Minnesota Uni-Serv/MEA/NEA and the Pierz Federation of Teachers.
- October 3-4, 1975—Agreement between Mid-Minnesota Uni-Serv/MEA/NEA and the Pillager Federation of Teachers.
- December 5-6, 1975—Substitute pay for members policy from other states. (1-page attachment)
- December 5-6, 1975—Minnesota Vocational Educator's Assoc. Constitution, proposal December 1975. (6-page attachment)
- February 6-7, 1976—National Education Association Board Meeting, December 12-14, 1975. (3-page attachment)

- February 6-7, 1976—Memorandum report of NEA directors regarding NEA Council of Great Lake states, January 30-31, 1976. (2-page attachment)
- April 8, 1976—Agreement between the Minnesota Education Association of Vocational Educators and the MEA. (4-page attachment)
- April 8, 1976—Report of NEA Board meeting, February 13-14, 1976. (2-page attachment)
- June 11-13, 1976—Report of NEA Board meeting, April 3, May 1-2, 1976. (5-page attachment)
- June 11-13, 1976—Legal opinion letter of attorney, John Wolf, Oppenheimer Lawfirm, to A. L. Gallop, Executive Director of the MEA re: MEA staff services: Organization.
- June 11-13, 1976—Memorandum from MEA attorney, Gary Green, to A. L. Gallop, June 8, 1976 re: review of John Wolf's opinion letter dated June 7, 1976. (2-page attachment)
- December 13-14, 1974—Organizational Agreement of the Minnesota Coalition of American Public Employees (2-page attachment)
- June 11-13, 1976—Draft of a provision on retention of local negotiators by the Future Goals Committee of the State Council for Negotiations (11-page attachment)
- September 10-12, 1976—MEA Board of Directors' meeting minutes, pp. 7-8, XXV, paragraph 2.
- September 10-12, 1976—Report of NEA Board of Directors' Meeting, June 23-25, 1976. (4-page attachment)
- September 10-12, 1976—IMPACE annual report of IMPACE annual meeting, April 3, 1976 (7-page attachment)
- November 5-6, 1976—Report of NEA Board of Directors' Meeting, October 1-3, 1976 and Great Lakes regional meeting, September 24-25, 1976. (3-page attachment)

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January 14-15, 1977—Report of NEA Board of Directors' Meeting, December 17-18, 1976. (4-page attachment)

January 14-15, 1977—Agreement between the Inter-Faculty Organization of the Minnesota State University and the Minnesota Education Association and the National Education Association, June 15, 1976 (5-page attachment)

The total cost of copying at 10 cents per page is \$40.00. Please reference the Knight matter when remitting payment.

Very truly yours,
OPPENHEIMER, WOLFF,
FOSTER, SHEPARD
AND DONNELLY
By: SUSAN M. KUZIAK
Legal Assistant

cc: Edwin Vieira
SMK:ds
Enc.

EXHIBIT F
Letterhead

OPPENHEIMER, WOLFF, FOSTER,
SHEPARD AND DONNELLY

February 10, 1977

William E. Mullin
Mullin, Weinberg & Daly, P.A.
2200 Dain Tower
Minneapolis, Minnesota 55402
Re: *Knight et al. vs. MCCFA, et al.*
Dear Bill:

Eric Miller and I have reviewed the requests for documents made in your letter of January 26, 1977. I want to express our concern with the fact that your requests are very expansive,

going beyond documents called for in revised Interrogatories to Defendant Unions, Sets I and II and beyond documents identified in Answers to those Interrogatories. Further, I am concerned, in light of the schedule of noticed depositions, with the limited amount of time available within which we can respond to your requests and prepare documents for production. Should additional documents be requested in the future, I suggest that the request be made formally pursuant to Rule 34, FRCP.

Following is our response to your requests. The responses correspond to the numbered paragraphs in your January 26 correspondence:

1. Consented to.
2. Consented to to the extent that such written reports exist which were not previously provided in conjunction with production of MCCFA Board of Directors meeting minutes.
3. Consented to.
4. Consented to.
5. Objected to on the basis that the request goes to information and materials beyond that called for in Interrogatories as revised in our Rule 5 correspondence and identified in Defendants' Answers. Further objection is made with regard to any and all documents not specifically related to the State of Minnesota.
6. Objection is made on the basis that the request is burdensome, overly broad and irrelevant and goes beyond the scope of materials identified in Rule 5 correspondence. Should you wish to identify press releases of a specific subject matter relevant to the issues raised in this litigation, we will be happy to reconsider such a request.
7. Consented to for the time period July 1, 1971 to the present with respect to specifically identified publications to

the extent that the documents have been retained by Defendants, MCCFA, MEA and NEA. Defendants are unable to produce any documents under the term "all publications," without further explanation and identification by Plaintiffs.

8. Consented to.

9. Consented to with respect to requests from Plaintiffs only to the extent such documents exist.

10. Consented to.

11. See the response contained in paragraph 5 above. Further objection is made with respect to the vagueness of the terms "legislation and legislative affairs" which are neither defined nor explained by Plaintiff.

12. See the responses to paragraphs 5 and 11 above.

13. Consented to. IMPACE has no Delegate Assembly. Minutes of IMPACE Annual Meetings will be provided.

The documents requested in paragraphs 1, 2, 3, 4, 10 and 13 of your January 26, 1977 letter will be available for your review in our St. Paul office on Monday, February 14 at and after 12:00 p.m. If you wish to have us provide copies of these documents, as was done with MEA Board of Directors minutes, additional time will be required. Please advise me of how you wish to handle the document review.

The specifically identified publications of the MCCFA and MEA requested in paragraph 7 will also be available for your review in our offices after 12:00 p.m. on Monday, February 14th.

With respect to the specifically identified publications of the NEA and the NEA documents requested in paragraphs 8 and 9, we will contact our client to determine the availability and volume of these materials. We will advise you at the earliest possible date when the documents will be available for review and whether this will be done in Washington, D.C. or

in our St. Paul offices. The financial information you refer to in the last paragraph of page 2 of your letter can be ascertained during the depositions of Mr. Chesebrough and Mr. Gallop.

It is my understanding in talking with Eric, that the deposition of Ralph Chesebrough has been rescheduled for Wednesday, February 16th, and the deposition of Mr. Gallop for Friday, February 18th. Mr. Gallop will not be available on the 18th. In an effort to maintain the schedule, we have contacted Cal Minke and arranged for his appearance on the 18th. As Mr. Minke must travel to the Twin Cities from Willmar, we ask that his deposition begin at 10:30 a.m. rather than at 9:00 a.m. We have tentatively rescheduled Mr. Gallop for Tuesday, February 22nd, as the 21st is a holiday. Please advise Susan Kuziak of our office, if the above arrangements are agreeable to you. We intend that the remaining depositions be taken as scheduled and are now in the process of contacting these individuals to confirm their availability.

In conjunction with the noticing of depositions and pursuant to Rule 34, you have requested certain additional documents. We respond to these requests as follows:

1. We have no objection to the production of expense accounts to the extent that they exist.
2. Objection is made to production of "daily files", "correspondence files", or other files on the basis that the request is burdensome, and so overly broad as to encompass materials which are irrelevant and not calculated to lead to the discovery of relevant information.
3. We are currently unaware of any activity reports beyond those contained within or attached to Board of Directors minutes previously provided. We are contacting each indi-

vidual scheduled for deposition in an effort to determine if additional activity reports do exist.

We are unable to guarantee providing the expense reports of Mssrs. Chesebrough and Minke four days in advance of their depositions. We will attempt to meet this time commitment with respect to other individuals to be deposed.

Very truly yours,
OPPENHEIMER, WOLFF,
FOSTER, SHEPARD
AND DONNELLY
By KEITH E. GOODWIN

KEG:ds

EXHIBIT G

Letterhead

OPPENHEIMER, WOLFF, FOSTER,
SHEPARD AND DONNELLY
Attorneys at Law

March 1, 1977

William E. Mullin
Mullin, Weinberg & Daly, P.A.
2200 Dain Tower
Minneapolis, Minnesota 55402
Re: Knight, et al. vs. MCCFA, et al.
Dear Bill:

MEA Delegate Assembly minutes for the years 1976 through 1972 have now been made available for review in response to the request contained in ¶13 of your letter of January 26, 1977. The following is an identification, by date, page and general subject matter, of those portions of the minutes deleted pursuant to a claim of attorney-client privilege:

1973

VOLUME II: pp. 137, 151-152, 154, 155, 156, 200, 206, 211-212, 214, 217-218, 219, 223, 232-233 — Opinions of attorney, John Wolf re: Legality of newly proposed MEA By-Laws.

VOLUME III: pp. 261-262-263 — Opinion of attorney, John Wolf, re: Legality of special assessment of members.

VOLUME III: p. 410 — Report of legal advice re: establishment of Economic Service Corporation.

1974

VOLUME I: pp. 56-58 — Report of attorney, Craig Gagnon, re: MEA legal matter; St. Louis Park teacher terminations.

VOLUME I: pp. 147-148 — Advice of attorney, John Wolf, re: Bureau of Mediation Services rulings.

VOLUME I: pp. 201-202 — Advice of attorney, John Wolf, re: Fair share fees.

VOLUME II: p. 208 — Advice of attorney, John Wolf, re: Bureau of Mediation Services.

VOLUME II: pp. 350-351 — Opinion of attorney, John Wolf, re: Proposed MEA By-Law Amendment.

VOLUME II: p. 376, 377-79 — Discussion of attorney, John Wolf, with delegates re: new business item concerning Master Contract language.

A summary of all documents produced pursuant to your January 26 correspondence as well as confirmation of the dates for rescheduled depositions will be provided under separate cover.

Very truly yours,
OPPENHEIMER, WOLFF,
FOSTER, SHEPARD
AND DONNELLY

By SUSAN M. KUZIAK

Legal Assistant

SMK:ds

cc: Edwin Vieira

A-87

EXHIBIT H

Letterhead

OPPENHEIMER, WOLFF, FOSTER,
SHEPARD AND DONNELLY

Attorneys at Law

March 1, 1977

William E. Mullin

Mullin, Weinberg & Daly, P.A.

2200 Dain Tower

Minneapolis, Minnesota 55402

Re: *Knight, et al. vs. MCCFA, et al.*

Dear Bill:

The purpose of this letter is to summarize those materials provided to you pursuant to the requests contained in your letter of January 26, 1977 and in your Request for Production of Documents served in conjunction with Notices of Deposition. The following documents (for the period July, 1971 to the present) have been produced to date:

MCCFA:

Board of Directors Meeting Minutes

Written reports given at MCCFA Board meetings regarding legislative matters

MCCFA Delegate Assembly Minutes

Written objections and requests for accounting received by MCCFA from Plaintiffs regarding payment of fair share fees

MCCFA materials relating to workshops or training programs (as identified in MCCFA Answers to Interrogatories, Second Set, Nos. 7 & 8)

MCCFA *Green Sheets* and MCCFA *News Flashes*

Expense reports of MCCFA Executive Director, Ralph S. Chesebrough and MCCFA President, James Durham

IMPACE:

- 4 Board of Directors Meeting Minutes
- Annual Meeting Minutes
- Expense reports of IMPACE Treasurer, John Schutt

MEA:

- Board of Directors Meeting Minutes
- MEA Delegate Assembly Meeting Minutes
- MEA *Advocate*, *Window on Legislation*, *VIP*, *Briefing Memo*, and *Window on the Legislation*
- MEA Political Action Workshop materials (1974, 1975, 1976)
- Expense reports of MEA Executive Director, A. L. Gallop, MEA President, Donald Hill, MEA Treasurer, Alfred Provo.

NEA:

"Speaking for Teachers" training materials (as identified in NEA Answers to Interrogatories, Second Set, Nos. 7 & 8)

In addition to the above-listed documents, the NEA, MEA, MCCFA and IMPACE Constitutions, By-Laws and Articles of Incorporation; budgets and financial statements; and various documents attached to Interrogatory Answers were provided to Plaintiffs prior to January 26, 1977.

Documents which you requested and which we have agreed to provide that have not as yet been provided are:

- NEA Board of Directors, Executive Committee and Representative Assembly meeting minutes
- NEA *Reporter*, *NEA Advocate*, *NEA NOW* and *Today's Education*
- Requests from Plaintiffs to the NEA regarding information on expenditures, if any, (as identified in NEA Answers to Interrogatories, First Set, No. 20)
- Expense accounts of NEA Executive Secretary, Terry Herndon, NEA President, John Ryor and the NEA Treasurer.

These documents will be produced at NEA headquarters in Washington, D.C. I will advise you when they will be available for review.

I have a copy of that portion of Ralph Chesebrough's deposition transcript in which you requested additional MCCFA documents. As soon as the available identified materials have been collected, they will be provided to you,

The rescheduled dates for upcoming depositions are as follows:

March 4—Calvin Minke (10:30 a.m.)

March 7—James Durham

March 9 & 11—Donald Hill

March 15 & 16—Fulton Klinkerfues

March 17—Chancellor Helland

March 18—John Schutt

The deposition of Alfred Provo has been temporarily cancelled. Mr. Provo will not be available again until the last week in March. I am attempting to schedule the deposition of Mssrs. Ryor and Herndon for the week of April 11, 1977, but as yet have not received conformation from the NEA of their availability during that time period. Please let me know if the above dates conflict with your understanding of the revised schedule.

Very truly yours,
OPPENHEIMER, WOLFF,
FOSTER, SHEPARD
AND DONNELLY
By: SUSAN M. KUZIAK
Legal Assistant

cc: Edwin Vieira
Donald Mueting
Stephen Befort

A-90

EXHIBIT I

Letterhead

OPPENHEIMER, WOLFF, FOSTER,
SHEPARD AND DONNELLY

June 27, 1978

Mr. Edwin Vieira, Jr.
National Right to Work
Legal Defense Foundation, Inc.
8316 Arlington Blvd., Suite 600
Fairfax, Virginia 22030

Mr. William E. Mullin
Mullin, Weinberg & Daly, P.A.
2200 Dain Tower
Minneapolis, Minnesota 55402

Re: *Leon Knight, et al. vs. MCCFA, et al.*

Gentlemen:

Attached to this letter you will find a listing, alphabetically by subject matter, of the files maintained in Mr. Gallop's office for the year 1977-78. This list was prepared in our office as no file index is kept by Mr. Gallop or his secretary. Bill, I am providing this list as a result of our phone conversation yesterday. I indicated that with regard to 'correspondence' files both the document requests and the deposition testimony in which the files were identified are very vague. It is difficult, therefore, to determine what falls within the scope of the Request, i.e., what kind of documentation you are seeking.

The subject listing is provided for your review. If it proves helpful to you in more clearly defining what documents you are requesting, I will prepare similar lists for Mr. Gallop's previous years' files. If you're unable to be more specific on the basis of subject matter, perhaps you can provide additional definition as to the types of documents sought.

The same problem of vagueness we face with respect to Mr. Gallop's correspondence files is being encountered with the files of those NEA people scheduled for deposition. In the interest of facilitating the remaining discovery, I would hope any clarification with regard to the Gallop files would be applicable to the NEA correspondence files.

I am suspending my work on collection and preparation of correspondence files pending a response from you. We are anxious to comply with all appropriate document requests. We would like to do this, though, in the most efficient and least costly manner. I anticipate hearing from you within the next few days.

Very truly yours,
OPPENHEIMER, WOLFF,
FOSTER, SHEPARD
AND DONNELLY
By: SUSAN M. KUZIAK
Legal Assistant

SMK:ds

Enclo.

P.S. Dr. Vieira, this letter is a result of a phone discussion with Bill on 6/26/78. He asked that I add a note requesting that you call him re: the above—so here it is.

A—General

Arbitration Position

Applicants

Attorney—other

Attorney—Mr. Green

Affirmative Action

Applicants for GR

Application Forms—Affirmative Action Forms—Etc.

Applicants for Arbitration

Applicants for NEG
Applicants for IPD
Affirmative Action—Northeast Range
Capital Affirmative Action Forms
Affiliates
Associates
B—General
Board Committees
Master Contract Committee
Personnel
Crisis Fund Committee
Evaluation Committee
Restructure Committee
Special Board Committee
Manual for Officers—Etc.
C—General
Car Leasing
Staff Liaisons to Councils
Council Coordinating Committee
Communications
Field Services
Economic Services
IPD
Negotiations
GRC
PR and R
Resolutions
Credit Union—MEA
D—General
E—General
Education Associations (states)
1978 MEA Elections

F—General
Fair Share
G—General
Governor Perpich
H—General
Hennepin UniServ Units Contracts
I—General
IMPACE
J—General
K—General
L—General
Legislation
Legislators—Minn.
Leaders Digest
Mc—General
M—General
Minority Intern Program
MEA Conventions
MASA
MSAE
Minn. State University Assoc. of ADM. and Service Faculty
N—General
NEA—St. Louis Group
Radisson on National Education Association R. A.
NEA Directors
O—General
Officers
 —Mr. Hill
 —Ms. Zens
 —Mr. Provo
P—General
R—General

1979 Rep. Assembly
1979 R. A.
S—General
Staff Job Descriptions
Staff
Cabinet Staff (Exec. Staff)
Exec. Staff Contracts
Executive Staff Vacation, Sick Leave, Personal Leave
Mr. Palmer
Mr. Brunell
Mr. Churchill
Mr. Moriarity
Mr. Pratt
Mr. Thiemich
Mr. Lentz
TSA
Executive Directors' Contract
SSA
TSA Contracts
PSA
Staff Contracts
Staff Retirement
Staff Vacation
Staff Seniority List
Staff Fringes
Strikes
Speeches and Articles
St. Dept. of Educ.
T—General
Treasurer's Position
U—General
Unfair Labor Practices

Union
UniServ Chairpersons
U.S. Congressmen
V—General
W—General
Work Orders
XYZ—General
UniServ Staff
State Staff
NEA

EXHIBIT J

Letterhead

OPPENHEIMER, WOLFF, FOSTER,
SHEPARD AND DONNELLY

July 10, 1978

William Mullin
Mullin, Weinberg & Daly
2200 Dain Tower
Minneapolis, Minnesota 55402
Edwin Vieira
National Right to Work
Legal Defense Foundation, Inc.
8316 Arlington Blvd., Suite 600
Fairfax, Virginia, 22030
Re: Leon Knight, et al. vs. MCCFA, et al.
Gentlemen:

Enclosed and served upon you please find Defendant, NEA's Response to Plaintiffs' Request for Production. Also enclosed is Defendants' MCCFA, MEA, IMPACE and NEA, Response to Plaintiffs' additional Document Request.

All correspondence files to be produced will be responsive to the Requests as verbally amended and clarified by Dr. Vieira,

through Mr. Mullin's office, on Friday, June 30, 1978. Such files will include the following: letters, written correspondence, memoranda to the file, internal and external memoranda, press releases (released under the individual's name), telegrams, written records of phone conversations and written records of discussions.

Bill, it's my understanding per your discussion with Susan Kuziak of our office that you expect production of an individuals' correspondence files one week in advance of his/her deposition. We will meet this commitment to ensure timely progression of the agreed upon deposition schedule.

Very truly yours,
OPPENHEIMER, WOLFF,
FOSTER, SHEPARD
AND DONNELLY
By: ERIC R. MILLER

SMK:ds

EXHIBIT K

Letterhead

MULLIN, WEINBERG & DALY, P.A.

November 7, 1978

Eric R. Miller, Esq. and

Keith E. Goodwin, Esq.

Oppenheimer, Wolff, Foster,

Shepard and Donnelly

W-1700 First National Bank Building

St. Paul, Minnesota 55101

Re: Leon Knight, et al., vs. MCCFA, et al.

Our File Number 2447

Gentlemen:

This is to confirm our agreement reached at our Rule 5 meeting of Monday, November 6th, concerning document pro-

duction to be made in lieu of the documents requested in the notices of depositions of the persons named below.

1) The following documents will be produced in advance of Sue Zagrabelny's deposition:

a) All documents which exist in any MEA, IMPACE or MCCFA file under a designation referring to the "1340 Club/Committee";

b) All documents of MEA, IMPACE or MCCFA in files designated as relating to Sue Zagrabelny which relate to the MEA "1340 Club/Committee", IMPACE, or to the campaign of any candidate for election to public office who has received aid of any kind in regard to his/her campaign from MCCFA, MEA, NEA, UniServ, their officials, staff-personnel, or members, or any departments, counsels, committees, or other subdivision thereof.

c) All files in Sue Zagrabelny's possession which relate to the MEA "1340 Club/Committee", IMPACE, or to the campaign of any candidate for election to public office who has received aid of any kind in regard to his/her campaign from MCCFA, MEA, NEA, UniServ, their officials, staff-personnel, or members, or any departments, counsels, committees, or other subdivision thereof.

2) Regarding the deposition of Ken Bresin, there will be produced all correspondence specifically filed or designated as his correspondence. It is understood that this will involve only current materials, as no specifically-designated files are kept for him or by him.

3) Regarding the deposition of R. Dick Vander Woude, there will be produced all correspondence specifically filed or designated as his correspondence.

4) The following documents will be produced in advance of the deposition of Ken Pratt:

- a) All MEA news or press releases, located in files of the MEA where they are specifically designated as such;
 - b) All public relations materials used at workshops or other training sessions, specifically kept together or retained by MEA in a separate file;
 - c) MEA files of resource material and documents relating to the preparation of the *MEAdvocate*, including files of the IPD and other counsels, but excluding galleys, proofs or photographs;
 - d) All correspondence specifically filed or designated as his correspondence.
- 5) The following documents will be produced in regard to the Susan Lowell deposition:
- a) All NEA news or press releases, located in files specifically referring to news or press releases;
 - b) All speeches or addresses prepared for delivery by NEA officials or staff-personal filed with the NEA in a file designated as such;
 - c) All NEA advertisements files with the NEA under designations referring to NEA advertisements;
 - d) All public relations materials for workshops or other training sessions which are kept or filed together in a file designated as such;
 - e) All correspondence specifically filed or designated as her correspondence;
 - f) Any files of resource material or documents relating to the preparation of NEA publications, excluding galleys, proofs or photographs.
- 6) Regarding production of documents for the deposition of James A. Harris, you have advised that you will shortly provide the documents from the NEA executive files which you

previously agreed to produce. You advise that these materials will contain some documents referring to Mr. Harris. We will accept this in satisfaction of your obligation to produce documents for the Harris deposition.

7) The following documents will be produced for the Robert Harman deposition:

a) All documents which relate to duties, tasks and expectations of performance of duties of governmental relations consultants and political education consultants;

b) All documents relating to the activities of the NEA with respect to state or local referenda on the subject of "tax limitations, voucher plans, and government aid to private schools" which have been complied by the NEA in the recently-undertaken collection of information;

c) The "thick document", a special message from the Detroit meeting, on the condition that it can be located;

d) All correspondence specifically filed or designated as his correspondence.

We anticipate production of these documents as soon as possible, and in any event in advance of the deposition of the person to be examined on them.

Yours very truly,
WILLIAM E. MULLIN

WEM/dp

cc: Dr. Edwin Vieira, Jr.

Donald J. Mueting, Esq.

A-100

EXHIBIT L

Letterhead

OPPENHEIMER, WOLFF, FOSTER,
SHEPARD AND DONNELLY

November 10, 1978

Dr. Edwin Vieira, Jr.
National Right to Work Legal
Defense Foundation, Inc.

8316 Arlington Blvd.
Suite 600
Fairfax, Virginia 22038

Re: Knight vs. MCCFA

Dear Edwin:

I want to confirm our discussions this week concerning your most recently requested discovery. Bill Mullin's letter of November 7 is accurate concerning the paragraphs numbered 1, 2, 3, 4 and 6.

With respect to paragraph 5 of Bill's letter (the documents requested in conjunction with the Susan Lowell deposition), we have agreed to produce the central files within the communications department responsive to sub-paragraphs (a) through (f). I indicated that there would be very few documents responsive to sub-paragraphs (b) and (c).

In conjunction with paragraph 7 of Bill's letter (the documents requested in conjunction with the Robert Harman deposition) the only documents to be produced in response to sub-paragraph (a) are the expectation reports for Mr. Felix during the time he was responsible for the State of Minnesota and for Mr. Vander Woude during the time he has been responsible for the State of Minnesota. We have agreed to produce the documents responsive to the balance of the sub-paragraphs in paragraph 7.

The deposition schedule as of this moment is as follows:

November 16—Ken Bresin

November 17—Sue Zagrabelny

November 20—Richard Vander Woude

November 21—Ken Pratt

November 28—Robert Harman

It is anticipated that we will attempt to conduct the depositions of James Harris and Susan Lowell during the week of December 4 dependent upon our ability to produce the necessary documents in advance of that week. I indicated that we would try to produce any documents pertaining to the Bresin and Zagrabelny depositions on or before November 14 and the documents pertaining to the Vander Woude and Pratt depositions on or before November 17. We will also try to produce the documents for the Harman deposition during the week of November 20.

Very truly yours,
OPPENHEIMER, WOLFF,
FOSTER, SHEPARD
AND DONNELLY
By ERIC R. MILLER

ERM:jr

cc: William Mullin

Don Mueting

Steve Befort

Faith Hanna

EXHIBIT M

February 1, 1978

The Honorable Donald D. Alsop
United States District Court Judge
United States District Court,
District of Minnesota

110 South Fourth Street
Minneapolis, Minnesota 55401

Re: Leon Knight, et al., vs. MCCFA, et al.

Court File Number 4-74 Civ. 659

Our File Number 2447

Dear Judge Alsop:

Pursuant to Your Honor's letter of January 11, 1978, we are reporting to you on the preparation status of the case.

Interrogatories have been exchanged and answers or objections have been served. Twelve depositions have been conducted to date.

The major thrust of present efforts in the case centers on Plaintiffs' Requests for Admissions and accompanying Interrogatories. Six extensive meetings have been conducted to date concerning various objections and problems associated with the requests and Interrogatories. It is expected that several more meetings will be necessary to determine the extent of any remaining problems. It is contemplated the parties will have to request the Court for one additional extension of time beyond February 15 in order to complete the present review.

We are hopeful that most discovery problems can be resolved soon. The issue of whether or not a narrative stipulation of facts can or should be prepared is under consideration. The resolution of these questions will determine whether additional discovery is needed.

Both sides are committed to working on these questions, and resolving them as soon as possible. We will report to the Court on March 31, 1978, and hope that at that time we can present Your Honor with an estimate as to the date the case will be ready for submission.

Yours very truly,

MULLIN, WEINBERG
& DALY, P.A.

By WILLIAM E. MULLIN
OPPENHEIMER, WOLFF,
FOSTER, SHEPARD
AND DONNELLY

By ERIC R. MILLER
DONALD J. MUETING

Special Assistant

Attorney General

STEPHEN F. BEFORT

Special Assistant

Attorney General

AFFIDAVIT OF SERVICE

State of Minnesota

County of Ramsey—ss.

LOIS J. FASCHING, being first duly sworn, deposes and says that on January 26, 1979, she served the attached Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery and Affidavit of Eric R. Miller upon:

Mr. William Mullin

MULLIN, WEINBERG & DALY, P.A.

Dain Tower

527 Marquette

Minneapolis, MN 55402

Edwin Vieira
National Right to Work Legal
Foundation, Inc.
Suite 600
8316 Arlington Blvd.
Fairfax, Virginia 22030

by placing true and correct copies thereof in envelopes addressed as above stated (which are the last known addresses of said attorneys) and depositing the same, with postage prepaid, in the United States mails at St. Paul, Minnesota.

LOIS J. FASCHING

Subscribed and sworn to before me this 29th day of January, 1979, Mariann Macalus, Notary Public, Ramsey County, Minnesota. My Commission Expires July 30, 1985.

AFFIDAVIT OF SERVICE

State of Minnesota
County of Ramsey—ss.

LOIS J. FASCHING, being first duly sworn, deposes and says that on January 29, 1979, she served the attached Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery and Affidavit of Eric R. Miller upon:

Mr. Stephen Befort
Special Assistant Attorney General
303 Capitol Building
550 Cedar Avenue
St. Paul, Minnesota 55155
Mr. Donald J. Mueting
Special Assistant Attorney General
303 Capitol Building
550 Cedar Avenue
St. Paul, Minnesota 55155

by placing true and correct copies thereof in envelopes addressed as above stated (which are the last known addresses of said attorneys) and depositing the same, with postage prepaid, in the United States mails at St. Paul, Minnesota.

LOIS J. FASCHING

Subscribed and sworn to before me this 29th day of January, 1979. Mariann Macalus, Notary Public, Ramsey County, Minnesota. My Commission Expires July 30, 1985.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civ. No. 4-74-659

STATEMENT OF DEFENDANT
LABOR ORGANIZATIONS

LEON KNIGHT, et al.,

Plaintiffs,

vs.

MINNESOTA COMMUNITY COLLEGE
FACULTY ASSOCIATION, et al.,

Defendants.

INTRODUCTION

This statement is submitted in response to Plaintiffs' Memorandum Explaining the Interrelationship Among Further Discovery, Stipulations, and Trial.

STATEMENT

Plaintiffs take the position that if Defendants will not stipulate that Defendant labor organizations are a "special interest

political party," there must be a trial. Plaintiffs' position in this regard is typical of their approach to stipulations and Rule 36 Requests for Admission throughout this litigation. Unsatisfied with admissions as to factual data, Plaintiffs persist in demanding that the ultimate conclusions believed necessary to their constitutional arguments be admitted as well. From their ideological perspective, Plaintiffs may well believe it to be a 'fact' that Defendant labor organizations are a political party. Defendants believe this a matter to be determined by the court.

Defendants are willing to stipulate and have in the past admitted to underlying factual data deemed relevant by Plaintiffs to resolution of the question. Further discovery is unwarranted: Plaintiffs have had more than ample opportunity to discover factual data through a variety of means, and the conclusory, ideologically-tinted admissions sought by Plaintiffs would not be prompted by anything forthcoming in the additional proceedings. Plaintiffs have not been thwarted by any "conspiracy" of the Defendants to "Stonewall"—the late date at which Plaintiffs make this motion, its inconsistency with prior statements to the court, and the massive amount of discovery enjoyed indicate as much. Plaintiffs are thwarted only by their unwillingness to accept less than a stipulation to their legal conclusions.

CONCLUSION

Plaintiffs' motion should be denied.

OPPENHEIMER, WOLFF,
FOSTER, SHEPARD
AND DONNELLY
By ERIC R. MILLER
KEITH E. GOODWIN

A-107

DONALD W. SELZER, JR.
1700 First National
Bank Building
Saint Paul, Minnesota 55101
(612) 227-7271
Attorneys for Defendants
National Education
Association, its affiliates
and its officials and staff
personnel

Dated: March 19, 1979.

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civ. No. 4-74-659

LEON W. KNIGHT, et al., Plaintiffs,
vs.
MINNESOTA COMMUNITY COLLEGE FACULTY
ASSOCIATION, et al.,
Defendants,

DEFENDANT LABOR ORGANIZATIONS'
STATEMENT IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
DISSOLUTION, STAY, RECONSIDERATION
AND HEARING

Defendant Employee Organizations continue to oppose the prolonged attempts of Plaintiffs to avoid the discovery deadline in this case. The Court imposed this deadline at the sug-

gestion of Plaintiffs' counsel during a pre-trial conference on October 13, 1978. It was only on the eve of the deadline that Plaintiffs' counsel apparently had a change of heart and began a substantial effort at prolonging discovery. Discovery in this case has been exhaustive. Under these circumstances, the limitations on discovery ordered by the Court are well within its discretion.

Plaintiffs' allegations of "conspiracy" and "cover-up" have been argued at length to the Court in Plaintiffs' various memoranda. These assertions are not credible. Certainly the fact that Plaintiffs' counsel devoted great energy to attempting to substantiate their belief in some type of "conspiracy" against them is not an excuse for failing to pursue discovery on the merits. Finally, the record reflects that Plaintiffs' counsel did not fail in this regard; extensive discovery has been conducted. This fact alone makes Plaintiffs' reference to *Dennis v. United States*, 384 U.S. 855 (1966), erroneous. Plaintiffs' motion for dissolution should be denied.

Plaintiffs enjoy no right under the Federal Rules of Civil Procedure to oral argument on its discovery motion. It is difficult to imagine, given the length of the written argument already presented, that Plaintiffs need any additional opportunity to outline their contentions. Plaintiffs' motion for oral argument should be denied.

Finally, Plaintiffs' request for a stay pending appeal should be rejected. Plaintiffs' suggestion that the Court's ruling on a discovery matter is reviewable flies in the face of the accepted rule that discovery ruling of this kind are reviewable only on appeal of the case as a whole. *United States Alkali Export Ass'n, Inc. v. United States*, 325 U.S. 196 (1945), which concerned a conflict between a district court order and the func-

tioning of a federal agency, is irrelevant to these proceedings, except insofar as it states:

The writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews.

325 U.S. at 203. Plaintiffs ought not be permitted to unreasonable delay the trial of this matter by making such a frivolous appeal. The request for stay should be denied.

OPPENHEIMER, WOLFF,

FOSTER, SHEPARD

AND DONNELLY

By /s/ERIC R. MILLER

ERIC R. MILLER

KEITH E. GOODWIN

DONALD W. SELZER, JR.

1700 First National Bank
Building

Saint Paul, Minnesota 55101

Telephone: (612) 227-7271

Dated: May 8, 1979

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-74-Civil-659

LEON W. KNIGHT, et al,

Plaintiffs,

vs.

MINNESOTA COMMUNITY COLLEGE FACULTY
ASSOCIATION, et al,

Defendants.

Deposition of ROGER I. JOHNSON, taken before Virginia Ledford, a Notary Public in and for the County of Hennepin, State of Minnesota, on the 7th day of September, 1978, at 2200 Dain Tower, Minneapolis, Minnesota, commencing at 10:30 o'clock a.m.

[74] the State to get involved in that kind of an organization. Of course, all of the Community Colleges aren't really situated in every district so there was no way we could ever get Community College members into 134 districts. We have some districts where they don't.

Q. Who's the head of the 1340 Club?

A. As far as I know it's defunct or on somebody's back burner somewhere. Now I haven't heard from it. I don't know if it died, if it's ongoing. I don't know who's in charge.

Q. Does MCCFA have a corps of persons, whether or not formally organized, on which it can call on on short notice for political action when thought necessary?

A. MCCFA?

Q. Yes.

A. No.

Q. Does MEA have a nucleus of persons upon whom it can call on on short notice for political action?

A. It might in some areas, in some district out of the 134, but my guess is that maybe it's half a dozen, ten of them, maybe.

Q. Would these persons generally be the same from year after year?

A. I believe so.

Q. Does IMPACE make any effort to have contacts in each [154] A. Mr. Bradbury is the current chairman of the Governmental Relations Council and as such has a seat on the IMPACE Board in the same sense that Michael Sokup had.

Q. In 1978, did Mr. Bradbury—I should say has Mr. Bradbury assisted teachers to get into political campaigns for elective office?

Mr. Selzer: Would you repeat the latter part of the question?

(Pending question read.)

The Witness: I guess that I would ask that the question be clarified. You're talking about volunteering?

Mr. Logie: Yes, to get involved.

Mr. Selzer: Working with committees rather than running for office?

By Mr. Logie:

Q. That's right.

A. I have no specific knowledge of efforts, if any, that Mr. Bradbury has made in that regard.

Q. Is Mr. Bradbury also involved in whatever remains of the 1340 club?

Mr. Selzer: I object to the question as assuming that something remains to the 1340 Club, and I'm not sure what sort of evidence is on the record concerning that.

[155] You may answer to the extent that you can.

The Witness: Well, my response yesterday was a response to your question about whether or not there might still be some individuals who at one time had identified themselves as members of the so-called 1340 Club, and could they be called upon at a moment's notice or short interval of time to perform some legislative or political function, and my response was that I wouldn't be a bit surprised if there were some areas in the state, a small number I suggested of 134 legislative districts where there still could be individuals that could be called on the telephone and we could ask to get involved in some manner.

I indicated yesterday that I haven't heard anything from the 1340 Club. I used the word "defunct" to describe it. There doesn't seem to be any action going on associated with an attempt to organize it, reorganize it or keep it going. If such action is ongoing, I'm unaware of it.

However, I would presume that in lieu of his position as Governmental Relations Council, if there were such action he would know about it.

By Mr. Logie:

Q. Okay. Do you know Susan Zagrabelny?

A. Yes.

(Caption)

Washington, D.C.

Friday, December 29, 1978

Deposition of

ALICE MORTON

a witness in the above-entitled matter, called for examination by counsel for the plaintiffs, pursuant to notice, taken in the office of the witness, National Education Association Building, 1201-16th Street, N.W., Washington, D.C., beginning at 9:00 a.m., before Linda M. Farmer, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

[78] Q. Did you show me all of the areas where you were aware that there would be materials relevant to this document request?

A. I did.

Q. And did I, before that, describe to you the type of request that we were concerned with?

A. Yes, and the date.

Q. And did you observe that Ms. Hanna and myself searched all the places that you designated?

A. Yes, and—I made sure you did.

Q. And can you think of any place that we did not look where you, based on your experience in the archives, would expect to find material relevant to this document request? Was there any place that we overlooked?

A. No, other than the materials, information that would be found in the Reporter, and Today Education, and News, NEA News.

Q. Publications?

A. Those materials which you explained to me, that the plaintiff already had had, that you explained, and also the NEA handbooks.

(Caption)

DEPOSITION OF NEIL FREDERICK SANDS, taken by the Plaintiffs, before George Manke, a Notary Public in and for the County of Hennepin, State of Minnesota, on Wednesday, June 14, 1978, at 2200 Dain Tower, Minneapolis, Minnesota, commencing at 1:00 o'clock p.m.

[69] 1340 Club meeting in St. Cloud and gave a COLA report."

What is the 1340 Club?

A. Well, I'm not sure it was ever formally structured into anything. The concept was to have a number of teachers, and the number tentatively was set at 10. These are MEA members who would be identified as being residents and political activists or potential political activists in each of the 134 legislative districts in the State of Minnesota involving both the senate district and the house district. The 134 would be house district, so that there would be a thousand three hundred and forty teachers if we had ten teachers in every one of the 134 legislative districts.

Q. And what was the purpose of identifying these individuals and bringing them together in this Club?

A. Well, there were a lot of ideas being kicked around. As I say, I don't think the concept ever got off the ground and was formalized. I am not aware that it exists now in any sort of structured way. It's a concept of having teachers identified in a legislative district.

As I say, many ideas were being kicked around at that time as to how we might utilize this structure, but the structure was never completed sufficiently to [70] become a reliable vehicle in any useful way.

Q. So you are not aware that at the present time that 1340 type organization exists within the MEA?

A. If it does, I'm not hearing about it. Did you say a 1340 type club, type of organization?

Q. Yes. Type of organization.

A. I'm not aware if the 1340 exists. Now, there is what we call a—I don't know if it even has a name. There are screening teams which meet with legislators and discuss educational issues with candidates and incumbents for political office.

Q. Have you participated in any of these screen teams?

A. Yes, I have.

Q. Did you do so in 1976?

A. Probably, yes.

Q. Have you done so this year?

A. No.

Q. In 1976, can you recall the individuals who participated with you in the screening program?

A. You understand my hesitancy is I'm not positive about the year. I'm positive I did participate in these.

Q. Well, in whichever year it was.

A. Okay. There were three or four. One was Rick Theisen. I believe his name is—the others escape my memory.

Q. After you had had discussions with these legislators

(Caption)

Fairfax, Virginia

Thursday, November 30, 1978

Deposition of

JEFFREY B. SAUNDERS

a witness, called for examination by counsel for the plaintiffs, pursuant to notice, taken in the offices of the National Right to Work Committee, 8316 Arlington Boulevard, Fairfax, Virginia, beginning at 9:00 a.m., before Carolyn M. Craig, a No-

tary Public in and for the State of Virginia at large, when were present on behalf of the respective parties:

[37] IMPACE's role is strictly funding. They solicit voluntary contributions from teachers; that there was a seven-member board who screened political candidates, came out with an endorsement of a particular candidate, and when the endorsement was in terms of funding, the majority of their time was spent on soliciting.

MEA's role, on the other hand, there was no active endorsement of a candidate in terms of taking a vote. They did come out in support of a candidate. By "support," they came out in articles in their own MEA newsletter, articles to the general press, in a concerted effort to organize the teachers behind a candidate.

Q. To work as volunteers in the campaign?

A. He didn't say those exact words. He said it was a concerted effort to coalesce the teachers into a powerful voting bloc.

I lost my train of thought.

Q. You said in the course of this conversation, he made some mention that his hands were tied with respect to organizing teachers.

A. Right. I said, "How do you go about organizing teachers?"

[38] He said, he, personally, couldn't do anything, that his hands had been tied, that because of the lawsuit with the National Right to Work Foundation, NEA's attorneys had advised him not to get involved.

Q. Now that's the phrase he used or term he used, "NEA's attorneys"?

A. Yes, he did.

Q. Advised him not to get involved in what?

A. On company time. He said as a consequence, he has had to work on behalf of Fraser on his own time, after 4:30 p.m. An then he told me that he organized the delegates in his own district, that he has worked the telephone tree. I mentioned to him I worked the telephone tree for Fraser. He told me he, himself, had worked the telephone tree on Wednesday, Sunday and Monday, he said.

Q. So he told you he had been in the telephone tree on Wednesday the 6th—

A. I wrote down the dates.

Q. —Sunday the 10th and Monday the 11th; is that right?

A. That's right.

And I said, "Well, that's a lot of work. Are you compensated for this?" He kind of laughed and said no.

APPENDIX F

(Caption)

ORDER FOR PRETRIAL

A pretrial conference in the above-entitled matter will be held on Friday, October 13, 1978 at 9:30 a.m. before the undersigned in Courtroom No. 4 at the Federal Courthouse, St. Paul, Minnesota. The purpose of the pretrial will be to permit all counsel to advise the undersigned as to the current status of discovery and preparation for trial, and to further schedule trial preparation proceedings and the method of presentation of the case to the court.

Dated: September 25, 1978.

DONALD D. ALSOP

United States District Judge

APPENDIX G

(Caption)

ORDER

The above-entitled action came on for hearing before the undersigned United States Magistrate Judge on December 20, 1978, pursuant to Defendant National Education Association's motions to quash subpoenas issued to Matthew Reese and Alice Morton.

Edwin Vieira, Jr. and William E. Mullin appeared on behalf of plaintiffs; Eric R. Miller and Donald W. Selzer, Jr., appeared on behalf of defendant.

IT IS HEREBY ORDERED that:

(Based upon all of the files herein, and upon the briefs and arguments of counsel)

1. Plaintiffs may take the deposition of Alice Morton, Archivist of the National Education Association (NEA), on either December 28 and 29, or December 29 and December 30, 1978, the exact dates to be selected by the attorneys for the defendant. If defendant's attorneys select December 29 and 30 for the date of her deposition, and the 30th is inconvenient for her, Morton's deposition may be continued to the next mutually convenient date. The location of the deposition shall be the NEA Building, 1201 16th Street, Washington, D.C.

2. Morton shall produce, in response to the subpoena served upon her, all documents in the NEA archives pertaining to the participation, from January 1972 to the present time, of the NEA or its affiliates, or their officials, staff personnel or members, concerning activities related to the campaigns of candidates for election to public office.

3. Since plaintiffs have been unable to serve process upon one Matthew Reese due to no fault on their part, the termination date for deposition discovery as to him is extended to Feb-

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ruary 15, 1979. The deposition when taken will be in Washington, D.C. unless the parties agree to another mutually convenient place.

Dated: December 22, 1978

ROBERT G. RENNER

United States Magistrate

Filed Dec. 22, 1978, Harry A. Sieben, Clerk. By Cynthia Bentzer, Deputy.

APPENDIX H

RULE 3

PRETRIAL PROCEDURE

A. Generally

Each judge may prescribe such pretrial and discovery procedures as he may determine appropriate.

B. Interrogatories

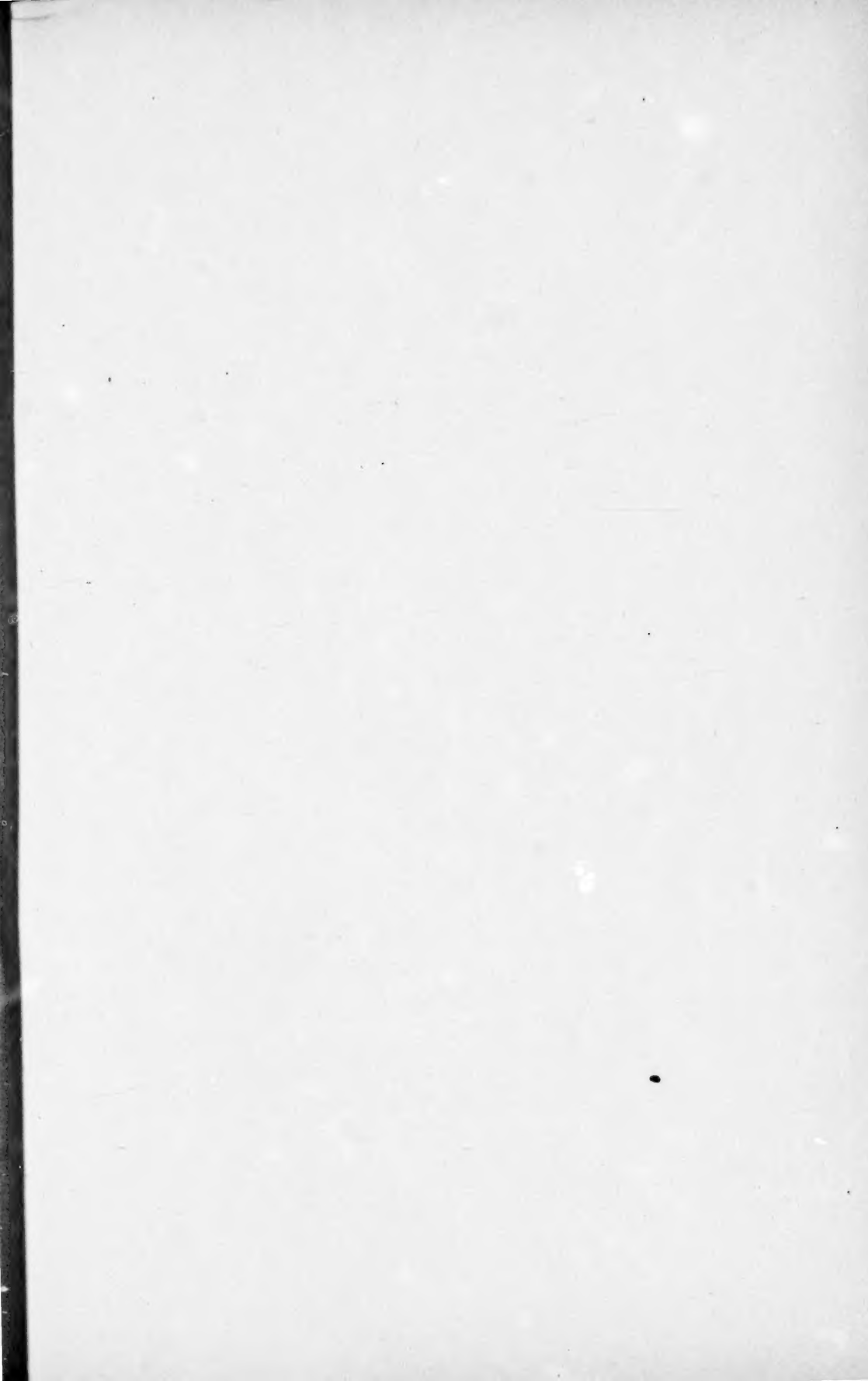
Parties answering interrogatories under Fed.R.Civ.P. 33 or requests for admissions under Fed.R.Civ.P. 36 shall repeat the interrogatories or requests being answered immediately preceding the answers.

No party may serve more than a total of fifty (50) interrogatories upon any other party unless permitted to do so by the court upon motion, notice and a showing of good cause. Such motions shall be in writing setting forth the proposed additional interrogatories and the reasons establishing good cause for their use. In computing the total number of interrogatories, each subdivision of separate questions shall be counted as an interrogatory.

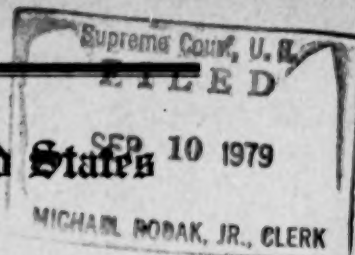
C. Pretrial Conferences

Each judge, on his own initiative, on motion of any party to an action, or by stipulation of the parties, may order the attorneys and the parties to appear for a pretrial conference to consider the subjects specified in Rule 16 of the Federal Rules of Civil Procedure or other matters determined by the judge.

The time of such conference shall be determined by the judge, and the clerk shall give reasonable notice to all parties to the action of the time for the conference.



IN THE
Supreme Court of the United States
OCTOBER TERM, 1979



No. 79-75

LEON W. KNIGHT, ET AL.,
Petitioners,

v.

THE HONORABLE GERALD W. HEANEY, UNITED STATES CIRCUIT JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND EARL R. LARSON AND DONALD D. ALSOP, UNITED STATES DISTRICT JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA,
Respondents.

**ON MOTION FOR LEAVE TO FILE PETITION FOR
EXTRAORDINARY WRIT DIRECTED TO THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA**

and

PETITION FOR EXTRAORDINARY WRIT

PETITIONERS' REPLY BRIEF

EDWIN VIEIRA, JR.
12408 Greenhill Drive
Silver Spring, Maryland 20904

JOHN J. FOGARTY
8316 Arlington Boulevard
Fairfax, Virginia 22038

Attorneys for Petitioners

Of Counsel:

RAYMOND J. LAJEUNESSE, JR.
8316 Arlington Boulevard
Fairfax, Virginia 22038

10 September 1979

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-75

LEON W. KNIGHT, ET AL., *Petitioners,*

v.

THE HONORABLE GERALD W. HEANEY, UNITED STATES CIRCUIT JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND EARL R. LARSON AND DONALD D. ALSOP, UNITED STATES DISTRICT JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, *Respondents.*

**ON MOTION FOR LEAVE TO FILE PETITION FOR
EXTRAORDINARY WRIT DIRECTED TO THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA
and
PETITION FOR EXTRAORDINARY WRIT**

PETITIONERS' REPLY BRIEF

Defendants National Education Association (NEA), Minnesota Education Association (MEA), Minnesota Community College Faculty Association (MCCFA), and Independent Minnesota Political Action Committee for Education (IMPACE)—the component parts of the United Teaching Profession (UTP)—have filed a brief in opposition to the Petition for Extraordinary Writ. If anything, the UTP's brief highlights the propriety and necessity of extraordinary relief in this case.

- I. This Court has exclusive jurisdiction under the All Writs Act to decide whether the District Court abused its discretion by denying Petitioners discovery necessary to make a full factual record for decision of the constitutional issues in this case.**

Petitioners have demonstrated why this Court has exclusive jurisdiction under the All Writs Act to issue an extraordinary writ in this case.¹ The UTP claims, however, that:

(i) “the power to issue the writ requested by petitioners lies with all courts possessing appellate jurisdiction that could arguably be aided by issuing the writ”;

(ii) “the Court of Appeals [for the Eighth Circuit] possesses immediate appellate jurisdiction over the issues raised by petitioners”;

(iii) “[t]he denial of the motion to reopen discovery involves neither a grant or denial of injunctive relief nor a decision on the underlying constitutional question. Direct appellate jurisdiction, therefore, lies only with the Court of Appeals”; and

(iv) although this Court has “concurrent” jurisdiction to issue the writ, it should defer to the Court of Appeals.²

These claims misconceive the nature and extent of this Court’s, and of the Court of Appeal’s, jurisdiction under the All Writs Act.

¹ Petition for Extraordinary Writ (P.) 2-4.

² Defendant Labor Organizations’ Brief in Opposition (B.) 4, 5, 6, 7-8.

The issuance of an extraordinary writ must be either an exercise of appellate jurisdiction, or an act necessary to enable the issuing court to exercise present, or to protect prospective, appellate jurisdiction.³ Jurisdiction to issue the writ depends upon the court's ultimate power to review the question involved in the petition,⁴ upon the potential perfection of an appeal on this question,⁵ and upon the possible defeat of ultimate appellate review of that question absent immediate intervention.⁶ Furthermore, in the exercise of its power under the All Writs Act, this Court can defer to a Court of Appeals only where that Court has "direct appellate jurisdiction" or "appellate jurisdiction on direct appeal" regarding the legal issue underlying the petition for extraordinary writ.⁷

³ *Ex parte* United States, 287 U.S. 241, 245-46 (1932).

⁴ *See, e.g.*, United States v. United States District Court, 334 U.S. 258, 263 (1948). The "ultimate power to review" may be by writ of certiorari. *Ex parte* United States, 287 U.S. 241, 246 (1932).

⁵ *See, e.g.*, Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943).

⁶ *See, e.g.*, McClelland v. Carland, 217 U.S. 268, 280 (1910).

⁷ *See, e.g.*, *Ex parte* United States, 287 U.S. 241, 248-49 (1932); *Ex parte* Republic of Peru, 318 U.S. 578, 584 (1943).

Of course, in cases of "public importance and exceptional character" this Court will not "relegate the [petitioner] to the circuit court of appeals, from which it might be necessary to bring the case . . . by certiorari", even where no three-judge court is involved. *Ex parte* Republic of Peru, 318 U.S. at 586. This case, involving as it does the application of *Elrod v. Burns*, 427 U.S. 347 (1976), is one of "public importance and exceptional character". Compare *Branti v. Finkel*, 457 F. Supp. 1284 (S.D.N.Y. 1978), *aff'd without opinion*, 598 F.2d 609 (2d Cir.), *cert. granted*, 47 U.S.L.W. 3821 (U.S., 26 June 1979) (No. 78-1654), *with* Rule 19(1)(b) of the Rules of this Court.

The question Petitioners present for review is whether the District Court abused its discretion under the Federal Rules of Civil Procedure and the Fifth Amendment to the United States Constitution by denying Petitioners discovery necessary to make a full factual record in support of their constitutional claims for injunctive relief against certain applications of Minnesota's Public Employment Labor Relations Act. The UTP incorrectly asserts that the Court of Appeals has "immediate" and "direct appellate jurisdiction" over this question. However, the District Court's order foreclosing further discovery is neither a final decision nor one granting or denying an injunction, and therefore is now appealable to neither this Court nor the Court of Appeals.⁸ Moreover, Petitioners can appeal the order only after an adverse final decision on the constitutional merits of the case.⁹ Then, appeal will lie exclusively to this Court.¹⁰ But by that time the Dis-

⁸ See 28 U.S.C. §§ 1253, 1291 (1970).

⁹ Should the District Court base an adverse final judgment on a non-constitutional ground, its denial of necessary discovery addressed to the constitutional merits will evidently not suffice as reversible error in the Court of Appeals.

¹⁰ If Petitioners lose on the constitutional merits at trial because of their inability, under the District Court's order foreclosing discovery, to muster sufficient evidence of the UTP's essentially political character, the Court of Appeals will have no appellate jurisdiction—"immediate", "direct", or even "concurrent"—to reverse the District Court's judgment on the basis of error in the latter order, and to remand for additional discovery and a new trial. This absence of prospective appellate jurisdiction over the very issue Petitioners now raise decisively militates against the UTP's position. *Compare and contrast* National Farmers' Org'n v. Oliver, 530 F.2d 815, 816-17 (8th Cir. 1976) (mandamus appropriate remedy where District Court denied petitioner opportunity to make a complete record on certain matters, and where District Court's error could not be corrected effectively on direct appeal to Court of Appeals).

trict Court's condonation of the UTP's "cover-up" may have defeated this Court's appellate jurisdiction.¹¹

In short, this Court has exclusive power of appellate review over the discovery-question Petitioners raise. The Court of Appeals has no appellate jurisdiction over that question, immediate or eventual, direct or indirect. Furthermore, Petitioners can perfect an appeal to this Court on the question, should they lose at trial on the constitutional merits of the case because of insufficiency of evidence. But Petitioners cannot appeal an adverse judgment on the constitutional merits to the Court of Appeals, no matter what errors they cite. And finally, denial of the Petition for Extraordinary Writ threatens to defeat this Court's exclusive appellate jurisdiction over the constitutional merits herein. Yet such denial cannot affect an appellate jurisdiction the Court of Appeals does not have. Therefore, rather than supporting the UTP's contention that the Court of Appeals has jurisdiction over the Petition, the very opinions of this Court upon which the UTP relies establish that the Petition is properly here.¹²

Consideration of this Court's decisions under the old Expediting Act confirms this conclusion.¹³ To impugn these authorities, the UTP notes that

Petitioners rely on several cases (Petition at 4 n.5) to support their contention that this Court "has exclusive jurisdiction * * *." The cited cases are inapposite.

¹¹ See P. 53 n.93.

¹² *Ex Parte* Republic of Peru, 318 U.S. 578 (1943), and *Ex parte* United States, 287 U.S. 241 (1932), cited at B. 7.

¹³ *E.g.*, *Tidewater Oil Co. v. United States*, 409 U.S. 151 (1972); *United States Alkali Export Ass'n, Inc. v. United States*, 325 U.S. 196 (1945).

The bulk of these cases * * * involved * * * the Expediting Act * * *.

Petitioners' application, on the other hand springs from a case for which appellate jurisdiction is based on 28 U.S.C. § 1253.¹⁴

The UTP fails to recall, however, that (as this Court noted) "[t]he three-judge-court procedure, with expedited review, was modeled after the Expediting Act".¹⁵ And therefore the reasoning of the Expediting-Act decisions is particularly applicable here.

The Expediting Act restricted appeals from final judgments in the District Court to this Court, and made no provision for appeals from interlocutory orders. Under these circumstances, this Court also assumed exclusive jurisdiction over petitions for ex-

¹⁴ B. 7 n.2. The UTP's footnote 2 typifies its refusal to acknowledge, let alone address, the authorities Petitioners marshal. By disingenuously claiming that all the cases Petitioners cite at P. 4 n.5 are "inapposite" because some involved the old Expediting Act, the UTP apparently hopes to evade the import of *Blay v. Young*, 509 F.2d 650 (6th Cir. 1974), in which the Court of Appeals abjured jurisdiction to issue extraordinary writs in three-judge-court cases, and of *Williams v. Simons*, 355 U.S. 49 (1957), in which this Court issued an order to show cause (later discharged as moot) where a party sought an extraordinary writ to compel a three-judge District Court *inter alia* to vacate a temporary restraining order that that Court had continued without passing on the constitutional merits of the complaint.

¹⁵ *Steffel v. Thompson*, 415 U.S. 452, 465 n.16 (1974). The footnote in *Steffel* also refers to a "1906 Act * * * applying the same procedure to suits brought to restrain, annul, or set aside orders of the Interstate Commerce Commission". Thus the pertinence of *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486 (1968), cited at P. n.5—another decision favorable to Petitioners that the UTP does not mention.

traordinary writs in Expediting-Act cases.¹⁶ In three-judge-court practice under 28 U.S.C. §§ 1253 and 2281 (1970), there are two categories of final judgments: (i) those that grant or deny injunctions on the constitutional merits, and are appealable to this Court only; and (ii) those that dispose of the case on all other grounds, and are appealable to the Courts of Appeals alone. Petitions for extraordinary relief in the nature of mandamus never deal with the merits directly.¹⁷ But some issues appropriate for review under such petitions so interrelate with the merits in a practical sense that they cannot be severed from them procedurally without impinging adversely on the final decision of the case at trial and on appeal. The District Court's order foreclosing further discovery raises an issue of this kind.

The order denies Petitioners the discovery necessary for a full factual record in support of their constitutional claims. Yet the development of a complete record is the *sine qua non* of proper constitutional adjudication: For the record defines and controls the nature of the issue presented on appeal, thereby determining and circumscribing the very existence and exercise of appellate jurisdiction. The denial of an opportunity to make a comprehensive record in the trial-court, then, is inextricable from decision of the merits of Petitioners' constitutional case at trial and

¹⁶ *Tidewater Oil Co. v. United States*, 409 U.S. 151, 154-61 (1972).

¹⁷ *Cf. Pacific Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S. 1310, —, 98 S. Ct. 2, 4 (1977) (Rehnquist, Circuit Justice).

on appeal to this Court.¹⁸ And the order denying discovery therefore falls into the category of non-final decisions so closely related to the ultimate constitutional merits of this litigation that only this Court can have jurisdiction to review them under the All Writs Act.¹⁹

This Court alone has jurisdiction to grant the extraordinary relief now imperative if Petitioners are to enjoy a full, fair, and adequate hearing of their constitutional claims.²⁰

¹⁸ Absent unique circumstances, the grant of excessive discovery raises less immediate concerns, since this Court will presumably exclude from consideration on appeal evidence that should not have been used as the basis for summary judgment, or introduced at trial. This Court cannot consider *undiscovered* evidence, however, no matter how material and admissible.

¹⁹ In response to this argument, the UTP proffers only the *non sequitur* that

[t]he denial of the motion to reopen discovery involves neither a grant or denial of injunctive relief nor a decision on the underlying constitutional question. Direct appellate jurisdiction, therefore, lies only with the Court of Appeals for the Eighth Circuit.

B. 6. Because the order denying further discovery is not a final "grant or denial of injunctive relief", there is no appellate jurisdiction in any court—only jurisdiction under the All Writs Act. But, because the order does directly and irremediably impinge in a practical way on "the underlying constitutional question", only this Court can entertain the Petition attacking that order as an abuse of discretion.

²⁰ *Pace* the UTP's contrary assertion. B. 8 & n.3. Indeed, the only relevant decision of the Court of Appeals for the Eighth Circuit that Petitioners have found—and the UTP cites no others—evidences that Court's aversion to assuming jurisdiction over three-judge-court matters. *Doe v. Turner*, 488 F.2d 1134 (8th Cir. 1973).

In the face of Petitioners' extensive reliance on decisions of this Court, the UTP interposes a make-weight argument based on *Breed v. United States District Court for the Northern District of Cali-*

II. The United Teaching Profession fails to refute Petitioners' showing that the District Court's denial of further discovery in this case is an unprecedented misapplication of the Federal Rules of Civil Procedure, and a clear violation of the Fifth Amendment to the United States Constitution.

The UTP's assertions that the District Court's termination of Petitioners' discovery is not an usurpation

fornia, 542 F.2d 1114 (9th Cir. 1976). B. 6-7, 8. In *Breed*, the Court of Appeals assumed jurisdiction to review on petition for mandamus an order of a three-judge District Court granting certain discovery:

• • • we have jurisdiction over appeals from appealable orders of three-judge district courts that do not resolve the merits of the constitutional claim presented. • • • We apply the same principle where petitioners seek an extraordinary writ, because § 1651 empowers us to issue such a writ "in aid of" our appellate "jurisdiction".

542 F.2d at 1115. But nowhere in its opinion did the *Breed* Court consider: (i) that the recognized limitation on its "jurisdiction over appeals from appealable orders" implied a parallel limitation of its jurisdiction under § 1651; and (ii) that, since it could never acquire jurisdiction to reverse a final decision on the constitutional merits because of the trial-court's erroneous interlocutory discovery-order, it could not logically deal with such an issue on petition for mandamus "in aid of" a jurisdiction foreclosed to it.

The readiness with which the *Breed* Court assumed jurisdiction is understandable in light of its holding that the issue there was controlled by its and this Court's contemporaneous decision in *Kerr v. United States District Court for the Northern District of California*, 511 F.2d 192 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976) (order of single judge granting discovery not reversible on mandamus). See 542 F.2d at 1114, 1115. Moreover, *Breed* may also be rationally defensible in that it addressed a *grant* of discovery, not a denial. See *supra* note 18. In any event, Petitioners need not labor to reconcile *Breed* with this Court's contrary decisions on extraordinary writs—a task, interestingly enough, that the UTP never undertakes, let alone accomplishes. Rather, it suffices to note that the UTP once again errs when it says that "[t]his petition is indistinguishable from that involved in *Breed*". B. 6.

of power amount only to naked denials or question-begging.

First, the UTP cites nothing in support of its claim that "[t]his case involves a settled question of judicial administration * * * and not an undecided question of public importance".²¹ Its inability to find even one legal authority sustaining such activities as Petitioners exposed to the District Court highlights Petitioners' exhaustive catalogue of contrary decisions under the Federal Rules of Civil Procedure,²² federal-court post-judgment practice,²³ and the Fifth Amendment.²⁴ Indeed, the settled law unanimously implies that the District Court's order denying necessary discovery is an unprecedented abuse of discretion; and the aberrance of that order underscores the substantial importance for this Court expeditiously and definitively to resolve the question Petitioners raise.²⁵

Second, the UTP ignores the leading decisions on mandamus when it denies that "petitioners raise issues peculiarly appropriate for direct review by this Court".²⁶ For the Petition concerns the construction and application of the Federal Rules of Civil Procedure (as well as their interrelation with the Fifth Amendment)—an issue this Court has unequivocally held is "appropriate for [it] to determine on the merits * * * and to formulate the necessary guide-

²¹ B. 8.

²² P. 31-39 & nn.27-54.

²³ P. 46 & nn.75-78.

²⁴ P. 45 & nn.68-74.

²⁵ See *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964).

²⁶ B. 8.

lines".²⁷ Furthermore, chaos in the administration of all civil litigation will almost certainly result from even tacit condonation of the UTP's notion that once a trial-court adopts a discovery-schedule, a party who exposes wrongdoing only at the end of the discovery-period is entitled to no relief under the Federal Rules. This Court, however, has recognized that an extraordinary writ should issue to prevent "so palpably improper" a nullification of the Rules.²⁸

Third, although the UTP prates about "[p]laintiffs' argument that a district court usurps power when it establishes discovery deadlines", Petitioners do not complain of the District Court's order of 13 October 1978.²⁹ Rather, they attack its order of 4 April 1979, that denied them relief under Federal Rule 37 notwithstanding their un rebutted demonstration of the UTP's wrongdoing based almost exclusively on evidence adduced between the hearing of 13 October and the discovery-deadline of 31 December 1978. Indeed, the deadline in this case is beside the point: The District Court's order denying the particularized and limited relief requested in their motion to extend discovery would be an abuse of discretion even if Peti-

²⁷ *Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964), *citing* *Los Angeles Brush Manufacturing Corp. v. James*, 272 U.S. 701, 706 (1927).

²⁸ *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957), *citing* *Los Angeles Brush Manufacturing Corp. v. James*, 272 U.S. 701, 706 (1927). As this Court said in *La Buy*,

even a "little cloud may bring a flood's downpour" if we approve the practice here indulged, particularly in the face of presently congested dockets, increased filings, and more extended trials.

352 U.S. at 258.

²⁹ B. 10.

tioners were still free to pursue other discovery.³⁰ (Of course, that Petitioners have no other recourse to secure evidence from the UTP prior to trial exacerbates the order's unconstitutionality.)

In short, that federal courts have rules, and that federal judges may exercise discretion in applying them, is no defense for the UTP. Petitioners do not dispute the existence or propriety of Federal Rules of Civil Procedure 1, 16, and 83; of Local Rule 3(a) of the United States District Court for the District of Minnesota; or of the *Manual for Complex Litigation*, as the UTP implies.³¹ Indeed, Petitioners request that certain of the Federal Rules be enforced, and certain procedures suggested in the *Manual* be utilized, on their behalf.³² The issue, then, is not "Are there valid rules and procedures?", but "Is the District Court's order an abuse of discretion in the face of the Federal Rules and the Fifth Amendment?" And on that issue, the UTP remains silent.³³

³⁰ The limited relief Petitioners requested appears at Petitioners' Appendices (A.) 25-31. Evidently, if Petitioners are entitled (for instance) to redepose Mammenga, or to examine the files of NEA's Government Relations Department, a denial of that entitlement is no less illegal because Petitioners could interrogate some other individual, or inspect some other files. If that were not the case, a Rule 37 order compelling discovery could never issue until discovery closed.

³¹ B. 10-11.

³² *E.g.*, appointment of a magistrate or special master to supervise discovery. A. 29. See *Manual for Complex Litigation* §§ 3.20, 3.21 (1978).

³³ The authorities on which it relies tell an eloquent story in Petitioners' behalf, though:

The *Manual for Complex Litigation* § 1.20 (1978) admonishes that "ordinarily, in a complex case, no summary judgment may be

III. The District Court's original discovery-deadline does not bar the relief Petitioners seek from the United Teaching Profession's refusal to make discovery in good faith.

The UTP contends that "[t]he District Court was well within its discretion when it issued its Order * * * establishing a discovery cut-off date of December 31, 1978", and that, not having opposed this order when

rendered on a genuine issue of fact in the absence of a fair opportunity to complete discovery on that issue". (Footnote omitted.) Yet, although denying Petitioners complete discovery, the District Court has forcefully expressed a preference for summary proceedings rather than a trial in this case. P. 48-49 n.82. Particularly relevant then is this Court's comment, cited in the *Manual*, that "summary procedures should be used sparingly in complex * * * litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot". *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) (footnote omitted).

Similarly, the UTP refers to this Court's recognition of "the power inherent in every court to control the disposition of the cases on its docket". B. 11-12, *citing* *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936). However, it does not quote this Court's holding that "the limits of a fair discretion are exceeded * * *. Relief so drastic and unusual overpasses the limits of any reasonable need, at least upon the showing made when the motion was submitted". 299 U.S. at 256, 257. In light of the precedents Petitioners muster, the District Court's order foreclosing necessary discovery is nothing if not "drastic and unusual * * * upon the showing made when the motion was submitted".

Again, the UTP elaborately reproduces remarks of the Court of Appeals for the Eighth Circuit on "cutting off discovery". B. 12, *citing* *Greyhound Lines, Inc. v. Miller*, 402 F.2d 134, 144 (8th Cir. 1968). However, it does not quote that Court's ultimate statement remanding the cause for a new trial because "the defendant was prejudiced by the lack of disclosure of the K.U. Medical record". 402 F.2d at 145. Moreover, this statement followed the Court's comments that the disputed document contained evidence which "[t]o a great extent * * * was cumulative", and could

entered, Petitioners may not now complain of it.” Once more the UTP begs the question—which is not whether the order of 13 October 1978 was valid on that date, but whether the District Court abused its discretion in refusing to rescind it, notwithstanding the evidence Petitioners subsequently amassed.

have been subpoenaed at trial in any event. *Id.* at 144. Here, not simply one document, but instead whole files of documents, are involved—documents that in large measure are not even arguably subject to subpoena for production at trial. A. 145-90; P. 49.

And again, the UTP parenthetically invokes a trial-court’s “power to order time limitations”. B. 12 n.5, citing *Riverside Memorial Mausoleum, Inc. v. Sonnenblich-Goldman Corp.*, 80 F.R.D. 433 (E.D. Pa. 1978). The UTP does not mention, though, that “[t]his case presents a picture of persistent and studied indifference . . . to court orders and to the time requirements of the Federal Rules of Civil Procedure”, and a “litany of defiance”. 80 F.R.D. at 434. Here, the UTP has engaged in “persistant and studied indifference” to the federal discovery-rules, as Petitioners’ Appendices describe.

Finally, the UTP quotes the Court of Appeals for the Ninth Circuit as saying that “the district judge presiding over discovery can dictate ‘the specific terms and conditions’ upon which discovery may be had”. *Transamerica Computer Co., Inc. v. IBM*, 573 F.2d 646, 652 (9th Cir. 1978). However, the UTP carefully avoids quoting the Court’s further statement that, “[p]articularly in ‘exceptional’ cases, . . . this power to establish deadlines is not unlimited, . . . for the parties must be given a fair and adequate opportunity to develop their cases”—or the statement that the trial-court’s discovery-schedule would have been “an unreasonable exercise of . . . discretion”, had it not been coupled with explicit safeguards. *Id.* at 653, 652, citing *Freehill v. Lewis*, 355 F.2d 46, 48 (4th Cir. 1966). Here, Petitioners seek no more than *Transamerica* recognizes: a fair and adequate opportunity to develop their case, notwithstanding a discovery-deadline that events have proven unreasonable.

²⁴ B. 13, 16-17.

The UTP berates Petitioners for a "lack of candor" before the District Court.³⁵ The record belies this contention: On 13 October, Petitioners considered 31 December a reasonable date for termination of discovery, presuming that the UTP would comply in good faith with the Federal Rules. Indeed, by 31 December Petitioners deposed all the witnesses they had theretofore identified as important, and fully inspected what the UTP's attorneys represented to be the complete files and archives Petitioners had requested it to produce. If the deponents had not testified falsely, evasively, and incompletely; and if the UTP's counsel had made full disclosure of the files and archives; then Petitioners would have accepted the deadline without complaint.

However, events subsequent to 13 October 1978 evidenced the antithesis of good-faith compliance with the discovery-rules. For example:

- The *post*-13 October testimony of UTP staff-men Bresin, Vander Woude, and Pratt verified the *pre*-13 October discoveries of Petitioners' private investigator.³⁶
- The *post*-13 October testimony and document-production of UTP staff-woman Zagrabelny exposed the falsity of the *pre*-13 October testimony of Chesebrough, Johnson, and Sands.³⁷

³⁵ B. 15. The implication, apparently, is that Petitioners somehow knew on 13 October that they could not complete discovery by 31 December 1978, and secretly intended even at the 13 October hearing to request an extension of discovery later on. How Petitioners would have fulfilled this alleged intention without uncovering massive evidence of its wrongdoing, the UTP does not explain.

³⁶ A. 259-97.

³⁷ A. 313-22.

- The *post*-13 October testimony and document-production of UTP staff-persons Baker, Harman, Lowell, and McFarland proved that Letorney's *pre*-13 October testimony was not truthful.³⁸

- The *post*-13 October testimony of Baker, Harman, Lowell, and McFarland was itself replete with false and incomplete answers.³⁹

- The *post*-13 October production of UTP files and the NEA Archives evidenced a conscious scheme, directed and in some instances openly acknowledged by the UTP's counsel, to withhold or destroy massive amounts of documentary evidence.⁴⁰

- Only just before the 31 December discovery-deadline—and *after* the depositions of Baker, Harman, Lowell, and McFarland—did Petitioners acquire the Shotts thesis, containing the outline of the UTP's 1976 presidential-campaign strategy about which those deponents had not told the whole truth.⁴¹

Petitioners cannot rationally be faulted for a "lack of candor", then, in not predicting for the District Court on 13 October 1978 what they would discover about the UTP's wrongdoing thereafter.

The UTP then attacks "the thoroughly inappropriate assumption that plaintiffs, through their private

³⁸ A. 258-59 n.108.

³⁹ P. 19-23, *summarizing* A. 137-43, 195-219, 223-34, 237-47, 412-13 n.2.

⁴⁰ A. 145-92, *and especially* A. 147-48, 149-52, 169-72, 178, 179, 188-90, 190-92.

⁴¹ On the history of Petitioners' acquisition of this revealing document, *see* P. 20 n.12; A. 412-13 n.2.

investigators, could more effectively deal with the alleged 'conspiracy' than could a United States District Court".⁴² Yet the UTP does not suggest how the District Court could "deal" with its malfeasance before Petitioners substantiated their suspicions with specific evidence. Was the Court itself to hold an inquisition—to interrogate witnesses, to review the UTP's (non-) production of documents file-by-file, to search for the Shotts thesis, or perhaps to infiltrate telephone-banks in search of UTP staff-personnel assisting candidates' campaigns under assumed names?

The UTP also belittles Petitioners for their "hope", prior to 13 October, that thereafter it might comply in good faith with the Federal Rules.⁴³ Disingenuously, it implies that Petitioners should have requested relief from the District Court before they compiled the evidence exposing the "cover-up", leaving for conjecture what relief that Court could have granted in the absence of facts proving bad faith in discovery.⁴⁴ Actually, the UTP's discomfiture lies not with the mere timing of Petitioners' action, but with its success in painstakingly collecting, analyzing, and presenting dispositive evidence of the UTP's wrongdoing.⁴⁵

⁴² B. 16.

⁴³ *Id.*

⁴⁴ And, of course, if subsequent to 13 October the UTP's staff-personnel had testified frankly and its counsel had produced all the documents to which Petitioners were entitled, the "cover-up" would have ended, leaving Petitioners with no cause to seek a Rule 37 order from the District Court.

⁴⁵ Since Petitioners had no obligation to expose or complain of the UTP's "cover-up" at all, they had no obligation to do so piece-by-piece, or at times and places tactically convenient to the UTP.

Next, the UTP charges that Petitioners “decided to concoct some type of ‘conspiracy’ to justify a prolonging of the discovery process”.⁴⁶ The record, though, establishes the improbability of any explanation other than conspiracy for the improper testimony of Baker, Bresin, Chesebrough, Harman, Johnson, Letorney, Lowell, Mammenga, McFarland, Sands, and Vander Woude; for the UTP’s withholding and destruction of documents; and for Bresin’s reference to “NEA’s attorneys”.⁴⁷

Finally, the UTP moralizes that “[a] trial court is entitled * * * to presume that counsel means what he says when he agrees to the substance of a proposed court order”.⁴⁸ To be sure. But the facts in the record on 31 December were strikingly different from those on 13 October 1978. And when Petitioners presented these new facts, the District Court should also have presumed that their fully documented charges were serious, instead of denying their motion summarily without hearing, findings, or opinion.

But, says the UTP, “[p]laintiffs may not complain about the terms of a discovery cut-off date which they agreed to”.⁴⁹ This, however, is not Petitioners’ complaint. Rather, they attack the UTP’s actions that thwarted effective discovery before the “cut-off date” and in violation of the Federal Rules. On 13 October 1978, Petitioners agreed to try to finish their discovery by 31 December—presuming that that was physi-

⁴⁶ B. 16.

⁴⁷ P. 27-28 n.18. *And see* Part IV., *infra* pp. 20-31.

⁴⁸ B. 16-17.

⁴⁹ B. 17.

cally possible, and that the UTP cooperated in good faith.⁵⁰ Where, in fact, compliance with the deadline was physically impossible, the Magistrate granted Petitioners an extension of time.⁵¹ Why they were not entitled to a similar extension when they showed that the UTP's wrongdoing had rendered compliance with the deadline a violation of their rights is the issue for decision here.

The absurd consequences of the UTP's argument indicates how this Court should decide that issue. Many trial-courts routinely establish discovery-schedules at the outset of litigation with the agreement of all con-

⁵⁰ The UTP itself quotes the pertinent remarks of Petitioners' counsel at the 13 October 1978 hearing:

We think we are getting just about to the end of what we consider is necessary to the presentation of the case

. . . we ought to be able to get it done, if we really push it, by early December—mid-December.

I think we can do that.

B. 14. These statements repel any inference of a "guarantee" that Petitioners would complete their discovery by 31 December, let alone of a willingness on their part to suffer in silence whatever wrongdoing the UTP chose to commit before that date.

⁵¹ When late in 1978 Petitioners sought to depose Matthew Reese, private consultant on political action to NEA, the UTP's attorneys importuned the Magistrate to quash the subpoena because of the oncoming discovery-deadline. The Magistrate had no difficulty denying this motion, and ordering that

3. Since plaintiffs have been unable to serve process upon one Matthew Reese *due to no fault on their part*, the termination date for deposition discovery as to him is extended to February 15, 1979. . . .

Order of 22 December 1978, *reproduced* in the UTP's Appendix G, B. at A-118 to A-119 (emphasis supplied).

cerned. According to the UTP, in such a situation, if party *A* cannot expose a "cover-up" by party *B* until the close of discovery, party *B* can prevail by invoking *A*'s "agreement" to the original schedule, no matter how illegal or obnoxious *B*'s conduct may have been. To sanction this theory will: (i) encourage every litigant with something to hide to pervert the otherwise proper procedure of scheduling discovery into a tool for suppressing it; and (ii) force every litigant honestly seeking evidence on the merits of his case to protect himself against "cover-ups" by additional (and otherwise unnecessary) discovery. What end this unconscionable result will serve, other than the deception of Petitioners and the federal courts as to its political activities, the UTP does not identify.

IV. Rather than disproving Petitioners' charges of wrongdoing in discovery, the United Teaching Profession evades the factual issues.

On the factual merits, the UTP has no defense. Rather, its brief is a pastiche of question-begging, elusion, double-talk, and misrepresentation.

First, it says that

[t]he plaintiffs have had a full and fair opportunity to conduct discovery in this case. * * * The documents produced in response to plaintiffs' demands number approximately 75,000 to 80,000 document pages. In addition, plaintiffs have taken the depositions of no fewer than 29 staff members of [the UTP] * * *.⁵²

⁵² B. 17. The UTP did not acquire an immunity from prospective application of the federal discovery-rules because it produced thousands of document-pages in the past. Massive production of documents is normal in complex litigation involving the day-to-day

Certainly, the UTP has produced document-pages; and its staff-personnel have given deposition-testimony. But are Petitioners entitled only to the documents the UTP chose to produce; or should they have received as well the numerous files and archival materials the UTP withheld, or the documents it destroyed and is now probably destroying? And, where Petitioners have shown that eleven deponents from the UTP testified falsely, evasively, or incompletely, should they be required to accept this testimony anyway to the exclusion of the truth about the UTP's political activism? Evidently, for the UTP to answer that it has produced some documents and its staff-personnel have given some testimony does not rebut the evidence Petitioners amass that its production was designedly incomplete and the testimony of its staff-personnel less than candid.

Second, the UTP contends that, rather than responding to Petitioners' charges individually, it may refute them collectively "through illustration".⁵³ Mere "illustrations", however, are not enough: For, since each incident of document-withholding, false testimony, and so on is unique, the disproof of one of Petitioners' charges (which the UTP never accomplishes in any event) does not disprove or even discredit others. To the contrary, the UTP's silence attests their cogency.⁵⁴

activities of large corporations. *See, e.g., IBM v. United States*, 480 F.2d 293, 295 (2d Cir. 1973) (referring to a trial-court's order to IBM "to produce some 17 million document pages in three months").

⁵³ B. 18 & n.9.

⁵⁴ Thus the fecklessness of the empty bluff that "[d]efendants reject unequivocally the notion that plaintiffs have presented any

Moreover, relief under Rule 37 depends, not upon whether Petitioners have suffered multiple prejudicial invasions of their rights, but upon whether they have suffered any. Therefore, to be secure in its defense (assuming *arguendo* it has one), the UTP would have to show that Petitioners have no basis for a Rule 37 order, not merely that a few bits and pieces of their evidence are supposedly disputable. For the existence of the dispute alone justifies additional discovery. Why, then, did the UTP not present the District Court (or this Court, for that matter) with a point-by-point rebuttal of Petitioners' case? Because (so it says with unheard-of self-restraint and modesty) it "refused to burden" the Court with evidence of its innocence!⁵⁵ The UTP's few "illustrations", though, indicate the real reason for its reluctance to join issue on the facts: its inability to disprove what Petitioners assert.

Deposition-Testimony

The UTP claims that "neither [Sands nor Johnson] stated that they knew that the 1340 Club was no longer in existence". Yet, in support of this contention,

evidence of misconduct by defendants or defendants' counsel". B. 18 n.9. Mere statements of counsel are not evidence, and cannot support a trial-court's decision that has no factual basis in the record. *E.g.*, *United States v. Howard*, 360 F.2d 373, 376 n.4 (3d Cir. 1966); *Thornton v. United States*, 493 F.2d 164, 167 (3d Cir. 1974).

⁵⁵ B. 18 n.9. From the perspective of practical litigation, the argument is ludicrous—since this Court can, and Petitioners submit should, credit their statement of facts unless (as is never the case) the UTP expressly controverts it. *E.g.*, *Investment Funds Corp. v. Bomar*, 306 F.2d 32 (5th Cir. 1962).

it brazenly quotes Sands as testifying that "I'm not aware if the 1340 exists", and Johnson as saying that "it's defunct", "I haven't heard anything from the 1340 Club", and "[t]here doesn't seem to be any action going on associated with an attempt to organize it, reorganize it or keep it going".⁵⁶ This defense is not only self-contradictory as presented, but also incredible in light of the record.⁵⁷

⁵⁶ B. 19. An illuminating sidelight is that the quotation from Johnson's deposition elides testimony from two separate days, and excises entirely the obvious signal from the UTP's counsel to the witness during direct examination. *See* A. 315.

Even more revealing, subsequent to Johnson's deposition, the reason the UTP's attorneys gave for not wanting to present MEA's staff-woman Zagrabelny for deposition was that her possible testimony on the "1340 Club/Committee" was largely irrelevant, "1340" being (or so counsel represented) "defunct". In the event, when she did appear Zagrabelny testified that, far from being "defunct", "1340" was involved in every aspect of MEA's political-action program. A. 316-17.

⁵⁷ A. 313-18. For example, Sands testified that "I don't think the ['1340'] concept ever got off the ground and was formalized", "the structure was never completed sufficiently to become a reliable vehicle in a useful way"; and Johnson averred that "[b]ack in the early days . . . we tried to get it going"—implying that nothing ever came of these efforts. Yet both Sands and Johnson recruited MCCFA members for "1340"; and Johnson was on the "1340" Task Force, the body delegated responsibility for organizing the group. Since, as Zagrabelny testified, "1340" was successfully organized, the contrary testimony of two of its organizers is at best highly suspect.

Moreover, Sands and Johnson are not simply peripheral characters in the UTP, who might be expected, as its attorneys lamely suggest, to "los[e] touch with the 1340 Club". B. 19. At one time or another, Sands was President of MCCFA, Chairman of MCCFA's Legislative Committee, a collector for IMPACE, a political-campaign activist and recruiter, a member of MEA's Governmental Relations Council, and a recruiter for "1340" itself. And Johnson was a long-time member of IMPACE's Board of Directors—and,

The UTP then expends a page of text trying to prove that certain testimony of Letorney was not evasive.⁵⁸ It says not a single word, however, about Letorney's other, false testimony.⁵⁹

In a footnote, the UTP describes Petitioners' proofs against Mammenga as exemplifying a "fallacy".⁶⁰ The

at the time of his deposition, Chairman of IMPACE. He, if anyone, was uniquely situated to know of the existence and activities of "1340" since, even as he claimed under oath that "1340" was "defunct", IMPACE was using reports from "screening" committees organized under "1340" auspices as a basis for endorsing candidates for public office.

Petitioners' charges against Sands and Johnson, then, are no "leaps in reasoning", as the UTP concludes. B. 20. Rather, they are direct applications of the insight that some testimony is inherently improbable on its face. *E.g.*, *Quock Ting v. United States*, 140 U.S. 417, 419, 420-21 (1891).

⁵⁸ B. 20-21. This Court can determine for itself whether Letorney's extensive testimony is evasive—for example, by considering his initial denial of involvement with "election pros" from a division of NEA other than his own, his initial attempt to characterize the activities of one of these "election pros" as "training" rather than out-and-out campaign work, and his repeated "lack of recollection". A. 249-50, 251-53, 254-58. The UTP does not contest this Court's authority to draw its own conclusions from the record. *E.g.*, *Orvis v. Higgins*, 180 F.2d 537, 539 & n.6 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950); *Hellenic Lines Ltd. v. Brown & Williamson Tobacco Corp.*, 277 F.2d 9, 13 n.5 (4th Cir. 1960); *Lang v. First Nat'l Bank of Houston*, 215 F.2d 118, 120 & n.2 (5th Cir. 1954); *Seagrave Corp. v. Mount*, 212 F.2d 389, 394 (6th Cir. 1954); *Dollar v. Land*, 184 F.2d 245, 248-49 (D.C. Cir.), *cert. denied*, 340 U.S. 884 (1950).

⁵⁹ A. 258-59 n.108, *cited at* P. 16.

⁶⁰ B. 21 n.11. The appendix-reference the UTP cites illustrates one of its characteristic rhetorical devices: taking a secondary point out of context and pretending it constitutes the sum of Petitioners' case. "For example," the UTP says, "plaintiffs make much of Mr. Mammenga's statement that he was not a 'volunteer' of any particular candidate campaign." Reference to the record

only fallacy involved here, though, is the UTP's assumption that, by evading the issues, it can somehow convince this Court to accept its unsupported protestations of innocence. The record establishes that Mammenga testified to *no knowledge*: (i) of contacts between MEA and the Carter-Mondale campaign; (ii) of persons involved with the Carter campaign in the role of organizer or liaison; or (iii) of "anyone who was working in any kind of chairperson capacity to this or that committee, Carter-Mondale". Yet the record also establishes that President-Elect Carter wrote to MEA's President, singling out Mammenga for special praise, and that Sokup and Zagrabelny testified to Mammenga's involvement as an "advance-man", to his participation in efforts to recruit members of MEA for Carter-Mondale, and to his contacts with the campaign-staff.⁶¹ The irreconcilable contradictions in the evidence thus pit Mammenga and the UTP's attorneys, on the one side, against Sokup, Zagrabelny, and President Carter, on the other. Only further discovery can determine which side is the more credible.⁶²

The UTP's reference to McFarland's testimony is another studied evasion.⁶³ Petitioners never accused

as a whole, though, explodes both this characterization, and the incoherent argument the UTP spins out of it. *Compare* A. 359 (the UTP's argument) *with* A. 219-22 (Petitioners' complete case against Mammenga) *and* A. 384-85 (Petitioners' refutation of the UTP's argument).

⁶¹ A. 219-22.

⁶² Indeed, the existence of this question alone sustains Petitioners' request for further discovery against MEA and IMPACE, particularly direct inspection of their files and redeposition of Mammenga himself. A. 28-29.

⁶³ B. 21. Note 60, *supra*, describes the rhetorical technique involved in the UTP's identifying "Plaintiffs true complaint".

McFarland of "denying" that "NEA's procedure for the endorsement of a 1976 presidential candidate" existed, as the UTP pretends. Rather, Petitioners charged him with false and evasive testimony concerning: (i) plans for mobilizing UTP officials, staff-personnel, and members throughout the country as campaign-workers for the 1976 presidential endorsee; (ii) cooperation between the UTP and the Carter-Mondale campaign-staff; (iii) the production and distribution of kits to aid local UTP organizers in recruiting campaign-workers; and (iv) the UTP's "member-contact" program on behalf of Carter-Mondale.⁶⁴ On these matters, the UTP remains silent.⁶⁵

⁶⁴ P. 19-22, summarizing A. 137-43, 195-219, 223-34, 412-13 n.2.

⁶⁵ And the non-responsive argument it does proffer deceptively plays on words. The UTP talks of "the NEA's procedure for the endorsement of a 1976 presidential candidate" and of "a time line for the endorsement by NEA members"—as if the UTP's only involvement in the 1976 campaign was the organization's endorsement itself. Actually, as the plan withheld from Petitioners by the UTP but reproduced in the Shotts thesis shows, the Program to Implement the NEA Presidential Endorsement Procedure (NEA Government Relations Department, 13 Jan. 1975) contained much more. From its "Introduction":

At the 1974 convention, the Representative Assembly adopted a procedure for endorsement of a Presidential candidate. The purpose of this paper is to describe a two-year, NEA-wide program for implementing the procedure. The objectives of this program are as follows:

1. Prepare members to support Presidential endorsement by NEA.
2. Mobilize organizational forces to affect selection of party nominee(s).
3. Gain party and candidate support for NEA positions on education issues.
4. Mobilize organizational forces to elect endorsed Presidential candidate.

Meeting these objectives will achieve for NEA the acknowledgement by the parties and candidates that NEA is indeed a major political force. • • •

The UTP finally claims that

[t]he primary evidence advanced in support of [the "cover-up"] * * * lies in the recollection of a statement allegedly made by MEA employee Kenneth Bresin while surreptitiously interviewed by one of the detectives * * * .

.

* * * it is impossible to fathom how a "cover-up conspiracy" engineered by defendants' counsel can be adduced from the record. "NEA attorneys" gave legal advice to their clients."⁶⁶

Petitioners' primary evidence, however, is far more extensive than the UTP admits, and includes:

- Bresin's and Vander Woude's false and evasive testimony about involvement in the candidate's telephone-bank operation."⁶⁷

The activities within each objective are detailed. Supplemental attachments will provide further specifics as they are developed (i.e., time schedules) or as they become known (i.e., procedures for delegate selection to the national nominating conventions).

It is important to emphasize at the outset that, to be successful, this program requires effort by the total organization. While GR has been charged with the development of the program plan and will coordinate its implementation, organizational responsibility for many aspects of the program will lie elsewhere. It will be necessary to utilize resources and expertise from many of the goal areas and support units. In addition, the smooth and successful operation of the program requires the cooperation and active involvement of our state affiliates.

C.T. Shotts, "The Origin and Development of the National Education Association Political Action Committee, 1969-1976" (Ph. D. thesis, Indiana Univ., Aug. 1976), Appendix G, at 136 (footnote omitted).

⁶⁶ B. 22.

⁶⁷ A. 260-75, 279-83.

- Bresin's concealment of the use of hundreds of MEA computer print-outs in the telephone-bank, and of the MEA Print Shop's role in preparing campaign-materials.⁶⁸

- Vander Woude's adoption of an assumed name in the telephone-bank.⁶⁹

- Vander Woude's remarks about the *Knight* litigation in the telephone-bank, and his subsequent denial of knowledge about the case.⁷⁰

- The mysterious "MEA policy" against political involvement by UTP staff-personnel, that neither Bresin nor Vander Woude followed.⁷¹

Against this background, Bresin's statement about "NEA's attorneys" and their advice compels the conclusion that there was, indeed, a "cover-up". If "NEA's attorneys" had given only legal advice—with emphasis on the adjective *legal*—why then did Bresin testify falsely about what he and Vander Woude did in the telephone-bank? Why then did Vander Woude attempt to deny his long-standing knowledge about this case? And why then did both refer to the "MEA policy" that no one honored? Only the discovery Petitioners seek, and the District Court denied, can answer these questions.⁷²

The foregoing establishes that the UTP's articulated defense on the merits is a sham. And that the UTP refrains from even attempting to explain away the

⁶⁸ A. 263-64, 275-79, 283-87.

⁶⁹ A. 262-66, 272-73.

⁷⁰ A. 290-91. *See also* A. 287-89.

⁷¹ A. 291-96.

⁷² *See* A. 296-97 for Petitioners' tentative conclusions.

testimony of Baker, Chesebrough, Harman, and Lowell is an admission of its impotency to exonerate these deponents.⁷³

Document-Production

With regard to production of documents, the UTP first says that

[s]pecific limitations concerning correspondence files were subject to negotiated agreement between the parties. * * * Plaintiffs' counsel never objected to the results of such negotiation. * * * At no time prior to December 30, 1978 did plaintiffs' counsel express any objection to the quality of document production nor did they ever move the [District] Court to compel the production of documents.⁷⁴

The record, however, contains numerous examples of explicit questions about, objections to, and demands for document-production.⁷⁵ In addition, the so-called "negotiated agreement[s] between the parties" were at best ultimata from the UTP's attorneys telling Petitioners to "take it or leave it".⁷⁶ Furthermore, Petitioners had no obligation to move to compel production of documents *seriatim* prior to the motion the District

⁷³ By singling out Baker, Bresin, Chesebrough, Harman, Johnson, Letorney, Lowell, Mammenga, McFarland, Sands, and Vander Woude, Petitioners do not concede that the rest of the UTP's twenty-nine officials and staff-personnel testified candidly. Absent complete production of documents, the testimony of every deponent remains under a cloud.

⁷⁴ B. 23.

⁷⁵ A. 147-90, and especially A. 147-48, 149-52, 169-72, 178, 179, 188-90.

⁷⁶ A. 380-82. And Petitioners never waived their right to object thereafter. See, e.g., B. at A-62 to A-63, A-76 (reservations of right to object by Petitioners' counsel).

Court denied in its order of 4 April 1979. Indeed, by meeting with the UTP's counsel, Petitioners satisfied Local Rule 5: In those meetings, the UTP announced what documents it would produce; and after Petitioners determined that that production was unsatisfactory and illegal, they sought Rule 37(a) relief, precisely as the Local Rule contemplates.⁷⁷ That Petitioners combined their many objections, and the extensive evidence supporting them, into a single, comprehensive motion was their privilege.

The UTP's rationalization of its refusal to comply with the Magistrate's order commanding production of the NEA Archives is the ultimate admission of its bad faith. The Archivist, the UTP says, showed its attorneys where to look for relevant information; and they looked.⁷⁸ Looking, though, is not equivalent to producing. And the attorneys admitted on the record that they produced only "selected portions" and "a fair sampling" of the documents identified to them.⁷⁹ Moreover, caught withholding certain documents so obviously relevant that even they could invent no excuse for their behavior, the UTP's attorneys reluctantly disgorged the materials.⁸⁰ Their last-minute compliance, however, cannot obscure the reality that they had initially withheld the documents without notice to

⁷⁷ Local Rule 5 provides in pertinent part as follows:

Conditions for discovery motions. No objection . . . to answers . . . relating to . . . discovery matters shall be heard unless it affirmatively appears that counsel have met and attempted to resolve their differences. . . .

⁷⁸ B. 23-24.

⁷⁹ A. 149-52, 161-63, 169-72.

⁸⁰ A. 169-71.

Petitioners, and would not have produced them at all absent the persistent demands of Petitioners' counsel.

Finally, the UTP admits it has destroyed documents, but then glosses over its wrongdoing as "two isolated incidents" impliedly involving but a few pages of material.⁸¹ To be sure, McFarland testified that certain identified documents might have been destroyed.⁸² But Petitioners' major complaint is that whole files, not just one or two documents, have apparently disappeared—and that those were the very files of Harman and McFarland, the top men in NEA's Government Relations Department who supervised the planning and implementation of the UTP's activities in the 1976 elections. Moreover, the admissions of document-destruction come from none other than the secretary to NEA staff-counsel Hanna (who said that certain of Harman's files "have been destroyed—for whatever reasons"), and the UTP's lead counsel Miller (who represented to Petitioners that certain of McFarland's files have also ceased to exist).⁸³ Thus, for the UTP now to belittle these admissions as "a gross exaggeration" is at best disingenuous, if not wholly impermissible.⁸⁴

⁸¹ B. 24-25.

⁸² A. 192.

⁸³ A. 190-92.

⁸⁴ The admissions were not simply casual observations. At the time, the UTP asserted the destruction of documents as its sole excuse for their non-production. For the UTP now to contend that but a few documents are involved, when previously it withheld whole files on the basis of its representations, is an unconscionable attempt to profit from its own wrongdoing.

CONCLUSION

In summary, without rebuttal by the UTP, Petitioners have shown that:

(i) the District Court's order foreclosing further discovery in this case denies Petitioners the necessary means to prepare a complete factual record on the constitutional issues they raise;

(ii) should an extraordinary writ not issue on their behalf, they will suffer irreparable injury from that order;

(iii) this Court has exclusive jurisdiction under the All Writs Act to hear their Petition for Extraordinary Writ;

(iv) if this Court does not hear the Petition, the District Court's order may subvert or defeat its ultimate appellate jurisdiction in this case; and

(v) on both the law and the facts, the District Court's order is an unprecedented misapplication of the Federal Rules of Civil Procedure, and a clear violation of the Fifth Amendment, that raises an issue of first impression central to the proper and efficient administration of federal trial-courts in civil litigation.

For these reasons, Petitioners respectfully request this Court to grant their motion for leave to file the Petition for Extraordinary Writ, and either issue the writ forthwith or set down this cause for oral argument.

Respectfully submitted,

EDWIN VIEIRA, JR.
12408 Greenhill Drive
Silver Spring, Maryland 20904

JOHN J. FOGARTY
8316 Arlington Boulevard
Fairfax, Virginia 22038

Attorneys for Petitioners

Of Counsel:

RAYMOND J. LAJEUNESSE, JR.
8316 Arlington Boulevard
Fairfax, Virginia 22038

10 September 1979

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rules 31(1), 33(1), and 36(1) of the Rules of this Court, I have served three copies of Petitioners' Reply Brief on each of the following Respondents or Counsel for Respondents, by mailing said copies to the addresses listed below, first-class postage-prepaid priority mail.

The Honorable Gerald W. Heaney
The Honorable Earl R. Larson
The Honorable Donald D. Alsop
c/o Mr. Gerald Berquist,
Chief Deputy Clerk
United States District Court
514 United States Court House
Minneapolis, Minnesota 55401

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Barbara Lindsey Sims, Esq.
Special Assistant Attorney General
515 Transportation Building
St. Paul, Minnesota 55155

Donald J. Mueting, Esq.
Special Assistant Attorney General
303 Capitol Building
550 Cedar Avenue
St. Paul, Minnesota 55155

Eric Miller, Esq.
Oppenheimer, Wolff, Foster,
Shepard and Donnelly
1700 First National Bank Building
St. Paul, Minnesota 55101

EDWIN VIEIRA, JR.
12408 Greenhill Drive
Silver Spring, Maryland 20904
Attorney for Petitioners

Done this tenth day of September, 1979.